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# TRANSCRIPT OF RECORD

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## Supreme Court of the United States

OCTOBER TERM, 1944

No. 368

GEMSCO, INC., ET AL., PETITIONERS,

vs.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND  
HOUR DIVISION OF THE UNITED STATES DEPARTMENT OF  
LABOR

No. 369

MILDRED MARETZO, ET AL., PETITIONERS,

vs.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND  
HOUR DIVISION OF THE UNITED STATES DEPARTMENT OF  
LABOR

No. 370

JOSEPHINE GUISEPPI, ET AL., PETITIONERS,

vs.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND  
HOUR DIVISION OF THE UNITED STATES DEPARTMENT OF  
LABOR

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ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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PETITION FOR CERTIORARI FILED AUGUST 18, 1944.

CERTIORARI GRANTED OCTOBER 16, 1944.

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[fol. 1]

**UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

JOSEPHINE GUISEPPI, DOMINICA DE MARCO, ROSA MORICI,  
Anthony Cimilluca, individually and trading as Cimi  
Embroidery Co., Simon Federman, individually and  
trading as Efficiency Novelty Works and Frank Jan-  
notti, individually and trading as Parisian Art Em-  
broidery, on behalf of themselves and all persons, firms  
or corporations similarly aggrieved and situated who  
may intervene in this proceeding, Petitioners-Appellants,  
against

L. METCALFE WALLING, as Administrator of the Wage and  
Hour Division, United States Department of Labor,  
Respondent

**PETITION**

To the Honorable Judges of the United States Circuit  
Court of Appeals for the Second Circuit:

The petition of Josephine Guiseppi, Dominica De Marco,  
Rosa Morici, Anthony Cimilluca, individually and trading  
as Cimi Embroidery Co., Simon Federman, individually  
and trading as Efficiency Novelty Works and Frank Jan-  
notti, individually and trading as Parisian Art Embroid-  
ery, the Petitioners above named, respectfully alleges:

First: That at all times hereinafter mentioned, L. Met-  
calf Walling was and still is the duly constituted and  
appointed Administrator of the Wage and Hour Division,  
United States Department of Labor.

Second: That on or about the 6th day of June, 1942,  
pursuant to the provisions of the Fair Labor Standards  
[fol. 2] Act of 1938, as amended, said Administrator ap-  
pointed Industry Committee No. 45 for the Embroideries  
Industry.

Third: That thereafter, the said Committee filed with the  
Administrator its recommendation for a minimum wage  
of 40¢ an hour.

Fourth: That thereafter, hearings were held upon the  
said recommendation, between the dates of November 2,  
1942 and November 13, 1942, inclusive.

Fifth: That on or about the 2nd day of September, 1943, the Administrator issued a Wage Order, dated August 21, 1943, applying to the Embroideries Industry, as therein defined.

Sixth: That the said order, in addition to approving the Industry Committee's recommendation of a 40¢ minimum hourly rate, contained provisions prohibiting homework in the Embroideries Industry, except where performed by workers

(a) unable to work in factories, because of physical or mental disability, or

(b) unable to leave home because the worker's presence is required to care for an invalid at home.

and then, only upon special homework certificates issued by the Wage and Hour Division.

Seventh: That all of the Petitioners are engaged in the Embroideries Industry, as defined in the said order, either in the capacity of homeworkers, or as employers of homeworkers.

Eighth: That all of the Petitioners are aggrieved by those provisions of the order aforesaid as prohibit, restrict and regulate the performance of homework, in that said provisions prevent the Petitioners from pursuing and carrying on their present respective lawful occupation or business.

Ninth: Petitioners submit that those provisions of the order which prohibit, restrict and regulate homework should be set aside in toto, upon the following grounds, among others:

(a) The Administrator possesses only the powers conferred upon him by the Fair Labor Standards Act.

(b) The Fair Labor Standards Act does not contain, nor does it confer upon the Administrator the power or authority to prohibit, restrict or regulate homework.

(c) That in promulgating the provisions of the order complained of, the Administrator exceeded the authority and powers vested in him by the Act, and violated the intent and purposes thereof.

(d) That the provisions complained of are not supported by substantial evidence.

(e) That the provisions complained of are unreasonable, arbitrary and discriminatory against the Petitioners and those similarly situated.

(f) That the provisions complained of are unconstitutional, being in violation of the Constitution of the United States of America.

(g) That the foregoing objections were duly and timely made to the Administrator.

Tenth: That jurisdiction is conferred upon this Court, by the Fair Labor Standards Act of 1938, as amended.

Eleventh: That each of the Petitioners resides or has his principal place of business within the City of New York, and within the circuit of this Court.

[fol. 4] Wherefore, your Petitioners, being aggrieved by the order of the Administrator dated August 21, 1943, do hereby appeal from so much of said order as prohibits, restricts and regulates homework, and respectfully pray that said order be modified by setting aside those provisions thereof prohibiting, restricting and regulating homework.

Dated: October 19, 1943.

Josephine Guiseppi, Petitioner, Dominica De Marco, Petitioner, Rosa Morici, Petitioner, Anthony Cimiluca, Petitioner, Simon Federman, Petitioner, Frank Jannotti, Petitioner. Landau & Friedman, By: Solomon S. Friedman, Attorneys for Petitioners, Office & P. O. Address, 1440 Broadway, Borough of Manhattan, City of New York.

[fol. 5] STATE OF NEW YORK,  
County of New York—ss:

JOSEPHINE GUISEPPI, being duly sworn, deposes and says, that she is one of the Petitioners herein and resides at 429 East 123rd Street, in the Borough of Manhattan, City and State of New York; that she has read the foregoing petition and knows the contents thereof; that the same is true to her own knowledge, except as to the matters therein

stated to be alleged on information and belief, and that as to those matters she believes it to be true.

Josephine Guiseppi.

Sworn to before me this 19th day of October, 1943.

Mildred Gerlack, Notary Public, Kings Co. Cert.  
filed New York Co. Commission expires March  
30, 1945.

STATE OF NEW YORK,  
County of Kings—ss:

DOMINICA DE MARCO, being duly sworn, deposes and says, that she is one of the Petitioners herein and resides at 1621 East 51st Street, in the Borough of Brooklyn, City and State of New York; that she has read the foregoing petition and knows the contents thereof; that the same is true to her own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters she believes it to be true.

Dominica De Marco.

Sworn to before me this 19th day of October, 1943.

Mildred Gerlack, Notary Public, Kings County.  
Commission expires Mar. 30, 1945.

[fol. 6] STATE OF NEW YORK,  
County of Kings—ss:

ROSA MORICI, being duly sworn, deposes and says, that she is one of the Petitioners herein and resides at 1619 East 51st Street, in the Borough of Brooklyn, City and State of New York; that she has read the foregoing petition and knows the contents thereof; that the same is true to her own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters she believes it to be true.

Rosa Morici.

Sworn to before me this 19th day of October, 1943.

Mildred Gerlack, Notary Public, Kings Co. Comm.  
exp. Mar. 30, 1945.

STATE OF NEW YORK,  
County of New York—ss:

ANTHONY CIMILLUCA, being duly sworn, deposes and says, that he is one of the Petitioners herein, and has his prin-

principal place of business at 323 West 38th Street, in the Borough of Manhattan, City and State of New York, under the firm name and style of Cimi Embroidery Co.; that he has read the foregoing petition and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

Anthony Cimilluca.

Sworn to before me this 19th day of October, 1943.  
Mildred Gerlack, Notary Public, Kings Co. Cert.  
filed N. Y. Co. Comm. exp. Mar. 30, 1945.

N [fol. 7] STATE OF NEW YORK,  
County of New York, ss.:

SIMON FEDERMAN, being duly sworn, deposes and says, that he is one of the Petitioners herein, and has his principal place of business at 162 West 34th Street in the Borough of Manhattan, City and State of New York, under the firm name and style of Efficiency Novelty Works; that he has read the foregoing petition and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

Simon Federman.

Sworn to before me this 19th day of October, 1943.  
Mildred Gerlack, Notary Public, Kings Co. Cert.  
filed N. Y. Co. Comm. exp. Mar. 30, 1945.

STATE OF NEW YORK,  
County of New York, ss.:

FRANK JANNOTTI, being duly sworn, deposes and says, that he is one of the Petitioners herein, and has his principal place of business at 2110 Third Avenue, in the Borough of Manhattan, City and State of New York, under the firm name and style of Parisian Art Embroidery; that he has read the foregoing petition and knows the contents thereof; that the same is true to his own knowledge, except as to

the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

Frank Jannotti.

Sworn to before me this 19th day of October, 1943.

Mildred Gerlack, Notary Public, Kings Co. Cert.  
filed N. Y. Co. Comm. exp. Mar. 30, 1945.

[fol. 8]

# NOTICE OF APPEAL

## UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

JOSEPHINE GUISEPPI, DOMINICA DE MARCO, ROSA MORICI,  
Anthony Cimilluca, individually and trading as Cimi  
Embroidery Co., Simon Federman, individually and  
trading as Efficiency Novelty Works and Frank Jannotti,  
individually and trading as Parisian Art Embroidery, on  
behalf of themselves and all persons, firms or corpora-  
tions similarly aggrieved and situated who may intervene  
in this proceeding, Petitioners-Appellants,

against

L. METCALFE WALLING, as Administrator of the Wage and  
Hour Division, United States Department of Labor,  
Respondent.

SIR:

Notice is hereby given, that Josephine Guiseppi, Dominica De Marco, Rosa Morici, Anthony Cimilluca, individually and trading as Cimi Embroidery Co., Simon Federman, individually and trading as Efficiency Novelty Works and Frank Jannotti, individually and trading as Parisian Art Embroidery, Petitioners-Appellants above-named, hereby appeal to the Circuit Court of Appeals, for the Second Circuit, from so much of the Wage Order dated August 21, 1943, made by L. Metcalfe Walling, as Administrator of the Wage and Hour Division, United States Department of Labor, as prohibits, regulates and restricts homework in

[fol. 9] the Embroideries Industry, as defined in the said Order.

Dated: October 19, 1943.

Landau & Friedman, by Solomon S. Friedman, Attorneys for Petitioners-Appellants, Office & P. O. Address, 1440 Broadway, Borough of Manhattan, City of New York.

To: L. Metcalfe Walling, Administrator, Wage and Hour Division, United States Department of Labor, 165 West 46th Street, City of New York.

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[fol. 10] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE  
SECOND CIRCUIT

MILDRED MARETZO; MARY FRANKS; FRANCES GIACONE; SALVATORE CALTABIANO and Attilio Caltabiano, co-partners doing business under the firm name and style of Caltabiano Embroideries; Abraham Friedensohn and Isadore Friedensohn, co-partners doing business under the firm name and style of Public Art Embroidery; George Kaplan; Julius Brody, doing business under name and style of Brody Embroidery Co.; David Goldfarb doing business under the name and style of Decor Embroidery; Moe Meyerson, Perry Meyerson and Henry Meyerson, co-partners doing business under the firm name and style of Meyerson Brothers; Veil Dotters Association of America, Inc., on behalf of itself and all its members producing or manufacturing embroideries and embellishing veils; and Pleaters, Stitchers & Embroiderers Ass'n., Inc., on behalf of itself and all its members producing or manufacturing embroideries, Petitioners-Appellants,

against

L. METCALFE WALLING, Administrator, Wage and Hour Division, United States Department of Labor, Respondent.

PETITION AND NOTICE OF APPEAL

• • • • •

[fol. 11] *To the Honorable, the Judges of the United States Circuit Court of Appeals for the Second Circuit:*

The petitioners Mildred Maretzo, Mary Franks, Frances Giaccone, Salvatore Caltabiano and Attilio Caltabiano, co-partners doing business under the firm name and style of [fol. 12] Caltabiano Embroideries, Abraham Friedensohn and Isadore Friedensohn, co-partners doing business under the firm name and style of Public Art Embroidery, George Kaplan, Julius Brody, doing business under name and style of Brody Embroidery Co., David Goldfarb doing business under the name and style of Decor Embroidery, and Moe Meyerson, Perry Meyerson and Henry Meyerson, co-partners doing business under the firm name and style of Meyerson Brothers, each for herself, himself, and itself; the petitioner Veil Dotters Association of America, Inc., on behalf of itself and all its members producing or manufacturing embroideries and embellishing veils; and the petitioner Pleaters, Stitchers & Embroiderers Ass'n., Inc., on behalf of itself and all its members engaged in manufacturing or producing embroideries, respectfully represent and allege:

### I

Your petitioner Mildred Maretzo, resides at 353 85th Street, in the Borough of Brooklyn, City and State of New York, within this circuit, and procures, and at all the times hereinafter mentioned, has procured a livelihood by performing work on embroideries in your petitioner's home or residence.

### II

Your petitioner Mary Franks, resides at 352 17th Street, in the Borough of Brooklyn, City and State of New York, within this Circuit, and procures, and at all the times hereinafter mentioned, has procured a livelihood by performing work on embroideries in your petitioner's home or residence.

### III

Your petitioner Frances Giaccone, resides at 3308 Bailey Avenue, in the Borough of Bronx, City and State of New York, within this circuit, and procures, and at all the times hereinafter mentioned, has procured a livelihood by performing work on embroideries in your petitioner's home or residence.

[fol. 13]

## IV

Your petitioners Salvatore Caltabiano and Attilio Caltabiano, co-partners doing business under the firm name and style of Caltabiano Embroideries, maintain and at all the times hereinafter mentioned, have maintained their principal and only place of business in the City, County and State of New York, within this circuit, and engage, and at all the times hereinafter mentioned, have engaged in the business of producing and manufacturing embroideries, a necessary and indispensable part of which business is the utilization by it of employees who perform work on embroideries in their own homes and residences.

## V

Your petitioners Abraham Friedensohn and Isadore Friedensohn, co-partners doing business under the firm name and style of Public Art Embroidery, maintain and at all the times hereinafter mentioned, have maintained their principal and only place of business in the City, County and State of New York, within this circuit, and engage, and at all the times hereinafter mentioned, have engaged in the business of producing and manufacturing embroideries, a necessary and indispensable part of which business is the utilization by it of employees who perform work on embroideries in their own homes and residences.

## VI

Your petitioner George Kaplan maintains and at all the times hereinafter mentioned, has maintained his principal and only place of business in the City, County and State of New York, within this circuit, and engages, and at all the times hereinafter mentioned, has engaged in the business of producing and manufacturing embroideries, a necessary and indispensable part of which business is the utilization by him of employees who perform work on embroideries in their own homes and residences.

## VII

Your petitioner, Julius Brody, doing business under name and style of Brody Embroidery Co., maintains and at all the times hereinafter mentioned, has maintained his principal and only place of business in the City, County and

State of New York, within this circuit, and engages, and at all the times hereinafter mentioned, has engaged in the business of producing and manufacturing embroideries, a necessary and indispensable part of which business is the utilization by it of employees who perform work on embroideries in their own homes and residences.

### VIII

Your petitioner David Goldfarb doing business under the name and style of Decor Embroidery maintains and at all the times hereinafter mentioned, has maintained his principal and only place of business in the City, County and State of New York, within this circuit, and engages, and at all the times hereinafter mentioned, has engaged in the business of producing and manufacturing embroideries, a necessary and indispensable part of which business is the utilization by it of employees who perform work on embroideries in their own homes and residences.

[fol. 15]

### IX

Your petitioners Moe Meyerson, Perry Meyerson and Henry Meyerson, co-partners doing business under the firm name and style of Meyerson Brothers maintains and at all the times hereinafter mentioned, has maintained their principal and only place of business in the City, County and State of New York, within this circuit, and engages, and at all the times hereinafter mentioned, has engaged in the business of producing and manufacturing embroideries, a necessary and indispensable part of which business is the utilization by it of employees who perform work on embroideries in their own homes and residences.

### X

Your petitioner Veil Dotters Association of America, Inc., is a corporation duly organized and existing under and by virtue of the laws of the State of New York.

Petitioner maintains, and at all the times hereinafter mentioned has maintained offices at 1440 Broadway, in the City, County and State of New York, within this circuit.

Petitioner is a trade association whose members are engaged in the business of producing and manufacturing embroideries of various kinds and the embellishing of veils and who, in the course of such business, necessarily must

employ persons who perform work in their homes or residences.

This petition is made by your petitioner, Veil Dotters Association of America, Inc., for itself and its members engaged in the business of producing or manufacturing and embellishing or in any manner, working on embroideries and veils, all of which members have their places of business within this circuit.

[fol. 16]

## XI

Your petitioner Pleaters, Stitchers & Embroiderers Ass'n., Inc., is a corporation duly organized and existing under and by virtue of the laws of the State of New York.

Petitioner maintains, and at all the times hereinafter mentioned has maintained offices at 1440 Broadway, in the City, County and State of New York, within this circuit.

Petitioner is a trade association consisting of about three hundred members, approximately sixty-six of which are engaged in the business of producing and manufacturing embroideries of various kinds and who, in the course of such business, necessarily must employ persons who perform work in their homes or residences.

This petition is made by your petitioner, Pleaters, Stitchers & Embroiderers Ass'n., Inc., for itself and its members engaged in the business of producing or manufacturing, or in any manner, working on embroideries, all of which members have their places of business within this circuit. The names and addresses of some of its members, all in the City of New York, are appended hereto as Exhibit "A" and are made a part hereof.

## XII

Upon information and belief, on or about June 6th, 1942, the Administrator of the Fair Labor Standards Act of 1938 (Act of June 25, 1938, C. 676, 75th Congress, 3rd Session, 52 Stat. 1060, 29 U. S. Code, Sections 201-219) allegedly acting pursuant to the said Fair Labor Standards Act of 1938, appointed Industry Committee #45 for the embroideries industry and directed the committee to recommend minimum wage rates for the embroideries industry.

[fol. 17]

## XIII

Upon information and belief, on or about June 30th, 1942, the aforementioned Industry Committee appointed by the Administrator of the Fair Labor Standards Act for the embroideries industry, filed with the Administrator a report recommending a minimum wage rate of 40¢ an hour in the embroideries industry.

## XIV

Upon information and belief, from on or about November 2nd, 1942, and to on or about November 13th, 1942, a hearing was allegedly held before a hearing officer designated by the Administrator of the Fair Labor Standards Act upon the aforementioned recommendation of Industry Committee #45 for the embroideries industry, and upon the question of the prohibition, restriction or regulation of homework in the embroideries industry.

Those proceedings were entitled:

“United States Department of Labor Wage & Hour  
and Public Contracts Divisions

In the Matter of:

Hearing on the Minimum Wage Recommendations of  
Industry Committee No. 45 for the Embroideries In-  
dustry and the Prohibition, Restriction, or Regulation  
of Homework in the Industry.”

## XV

Upon information and belief, oral argument was heard by L. Metcalfe Walling, Administrator, Wage and Hour Division, U. S. Department of Labor, respondent above [fol. 18] described, on or about January 26th, 1943, upon the record, of the proceedings described in paragraph XIV herein.

## XVI

Upon information and belief, on or about the 2nd day of September, 1943, there appeared in the Federal Register an order of L. Metcalfe Walling, Administrator, Wage and Hour Division, U. S. Department of Labor, approving and adopting the minimum wage rate recommended by Industry Committee #45 for the embroideries industry and further

ordering such restriction and limitation of homework in the embroideries industry as to amount to a prohibition of such work.

## XVII

The within petition is necessitated by reason of the order of L. Metcalfe Walling, Administrator, Wage and Hour Division, U. S. Department of Labor, described in paragraph XVI herein which, in effect, prohibited homework in the embroideries industry. Petitioners' request and petition for a review herein is limited to such portion of the Administrator's order and is not directed against that portion of the Administrator's order approving the recommendation of Industry Committee #45 for the embroideries industry to the effect that a minimum wage rate of 40¢ an hour be paid in the embroideries industry.

Each and every one of your petitioners herein are aggrieved by the aforementioned order of L. Metcalfe Walling, Administrator, Wage and Hour Division, U. S. Department of Labor.

## XVIII

By section 210 (a) of title 29, U. S. C. A., jurisdiction is vested in this court to review an order of the Administrator, Wage and Hour Division, U. S. Department of Labor, issued in such manner as the order of the Administrator described in paragraph XVI above has been issued, upon the petition of any aggrieved person residing or having its principal place of business within this circuit.

## XIX

The order of the Administrator, Wage and Hour Division, U. S. Department of Labor, hereinabove described insofar as it restricts and regulates work in homes and virtually prohibits homework in the embroideries industry is arbitrary, illegal, null, void, improper, and unconstitutional in that the Fair Labor Standards Act of 1938 does not give the Administrator the power to so order as to homework, and is an unlawful assumption by the Administrator of congressional powers and functions, and should be set aside.

In addition, so much of the said order as restrictively regulates and virtually prohibits homework in the embroideries industry is erroneous, arbitrary, contrary to law, contrary to evidence and not supported by the evidence adduced at the hearing and should be set aside.

Wherefore, your petitioners being aggrieved by the above mentioned order of L. Metcalfe Walling, Administrator, Wage and Hour Division, United States Department of Labor, hereby respectfully petition that said orders be set aside insofar as it prohibits, restricts, and regulates homework in the embroideries industry and virtually prohibits homework in the embroideries industry.

[fol. 20] Dated, New York, October 20th, 1943.

Mildred Maretzo, Mary Franks, Frances Giacone, Caltabiano Embroideries, by Salvatore Caltabiano, Partner; Public Art Embroidery, by Abraham Friedensohn, Partner; George Kaplan; Brody Embroidery Co., by Julius Brody; Decor Embroidery, by David Gildford, Proprietor; Meyerson Brothers, by Perry Meyerson, Partner; Veil Dotters Association of America Inc., by Barrett W. Landon, Executive Director; Pleaters, Stitchers & Embroiderers Ass'n. Inc., by Jack Orloff, President; Brower, Brill & Tompkins, Attorneys for Petitioners-Appellants, Office & P. O. Address, 165 Broadway, New York City.

To: Hon. L. Metcalfe Walling, Administrator, Wage & Hour Division, United States Department of Labor, New York, N. Y.

[fol. 22] STATE OF NEW YORK,  
County of —, ss:

Mildred Maretzo, being duly sworn, deposes and says that she is a petitioner in the within action, that she has read and knows the contents of the foregoing petition and that the same is true to her own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters she believes it to be true.

Sworn to before me this 20th day of October, 1943.

STATE OF NEW YORK,  
County of —, ss:

Mary Franks, being duly sworn, deposes and says that she is a petitioner in the within action, that she has read and knows the contents of the foregoing petition and that the

same is true to her own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters she believes it to be true.

---

Sworn to before me this 20th day of October, 1943.

[fol. 23] STATE OF NEW YORK,  
County of —, ss:

Frances Giacone, being duly sworn, deposes and says that she is a petitioner in the within action, that she has read and knows the contents of the foregoing petition and that the same is true to her own knowledge, except as to the matters herein stated to be alleged on information and belief, and that as to those matters she believes it to be true.

---

Sworn to before me this 20th day of October, 1943.

STATE OF NEW YORK,  
County of New York, ss:

Salvatore Caltabiano, being duly sworn, deposes and says that he is one of the partners of the co-partnership Caltabiano Embroideries, a petitioner in the within action and that he has read and knows the contents of the foregoing petition and that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

Salvatore Caltabiano.

Sworn to before me this 20th day of October, 1943.  
Abraham Gelb, Comm. of Deeds, City of N. Y.  
N. Y. Co. Clks. No. 14, Reg. No. 4 G 4. Kings Co.  
Clks. No. 46, Reg. No. 4005. Commission Expires  
Jan. 20, 1944.

[fol. 24] STATE OF NEW YORK,  
County of New York, ss:

Abraham Friedensohn, being duly sworn, deposes and says that he is one of the partners of the co-partnership Public Art Embroidery, a petitioner in the within action, and that he has read and knows the contents of the fore-

going petition and that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

Abraham Friedensohn.

Sworn to before me this 20th day of October, 1943.  
Abraham Gelb, Comm. of Deeds, City of N. Y.  
N. Y. Co. Clks. No. 14, Reg. No. 4 G 4. Kings Co.  
Clks. No. 46, Reg. No. 4005. Commission Expires  
Jan. 20, 1944.

STATE OF NEW YORK,

County of New York, ss:

George Kaplan, being duly sworn, deposes and says that he is a petitioner in the within action, that he has read and knows the contents of the foregoing petition that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

George Kaplan.

Sworn to before me this 20th day of October, 1943.  
Abraham Gelb, Comm. of Deeds, City of N. Y.  
N. Y. Co. Clks. No. 14, Reg. No. 4 G 4. Kings Co.  
Clks. No. 46, Reg. No. 4005. Commission Expires  
Jan. 20, 1944.

[fol. 25] STATE OF NEW YORK,

County of New York, ss:

Julius Brody, being duly sworn, deposes and says that he is a petitioner in the within action, that he has read and knows the contents of the foregoing petition; that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

Julius Brody.

Sworn to before me this 20th day of October, 1943.  
Abraham Gelb, Comm. of Deeds, City of N. Y.  
N. Y. Co. Clks. No. 14, Reg. No. 4G4. Kings Co.  
Clks. No. 46, Reg. No. 4005. Commission expires  
Jan. 20, 1944.

STATE OF NEW YORK,  
County of New York, ss:

David Goldfarb, being duly sworn, deposes and says that he is a petitioner herein; that he has read the foregoing petition and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters herein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

David Goldfarb.

Sworn to before me this 20th day of October, 1943.  
Abraham Gelb, Comm. of Deeds, City of N. Y.  
N. Y. Co. Clks. No. 14, Reg. No. 4G4. Kings Co.  
Clks. No. 46, Reg. No. 4005. Commission expires  
Jan. 20, 1944.

[fol. 26] STATE OF NEW YORK,  
County of New York, ss:

Perry Meyerson, being duly sworn, deposes and says that he is one of the partners of Meyerson Brothers, a petitioner herein; that he has read the foregoing petition and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters herein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

Perry Meyerson.

Sworn to before me this 20th day of October, 1943.  
Abraham Gelb, Comm. of Deeds, City of N. Y.  
N. Y. Co. Clks. No. 14, Reg. No. 4G4. Kings Co.  
Clks. No. 46, Reg. No. 4005. Commission expires  
Jan. 20, 1944.

STATE OF NEW YORK,  
County of New York, ss:

Barnet Landau, being duly sworn, deposes and says that he is the executive director of Veil Dotters Association of America Inc., a petitioner herein; that he has read the foregoing petition and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters herein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

Deponent further says that the reason this verification is made by deponent and not by the petitioner is because the said petitioner is a domestic corporation and deponent an officer thereof, to wit, its executive director.

Barnet Landau.

Sworn to before me this 20th day of October, 1943.  
Abraham Gelb, Comm. of Deeds, City of N. Y.  
N. Y. Co. Clks. No. 14, Reg. No. 4G4. Kings Co.  
Clks. No. 46, Reg. No. 4005. Commission expires  
Jan. 20, 1944.

[fol. 27] STATE OF NEW YORK,  
County of New York, ss:

Jack Orloff, being duly sworn, deposes and says that he is the president of the Pleaters, Stitchers & Embroiderers Ass'n., Inc., a petitioner herein; that he has read the foregoing petition and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters herein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

Deponent further says that the reason this verification is made by deponent and not by the petitioner is because the said petitioner is a domestic corporation and deponent an officer thereof, to wit, its president.

Jack Orloff.

Sworn to before me this 20th day of October, 1943.  
Abraham Gelb, Comm. of Deeds, City of N. Y.  
N. Y. Co. Clks. No. 14, Reg. No. 4G4. Kings Co.  
Clks. No. 46, Reg. No. 4005. Commission expires  
Jan. 20, 1944.

[fol. 28]

#### EXHIBIT A

Able Embroidery Corp., 234 West 39th St.\*  
Algy Trimming Co., Inc., 212 W. 29 St.  
Amelia Art Embroidery, 250 West 40th St.  
Annette Embroidery Co., Inc., 270 West 39th St.  
Apex Embroidery Co., Inc., 329 West 39th St.  
Art Scalloping & Emb. Co., 553 Eighth Ave.

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\* All addresses are in the City of New York.

Bauer Embroidery Co., Inc., 243 W. 39 St.  
 Edward E. Berger, Inc., 251 West 36th St.  
 Bijou Embroidery Corp., 270 West 38th St.  
 Brody Embroidery Co., 241 W. 36 St.  
 Bratman Brothers, 838 Sixth Ave.  
 Brody Embroidery Co., 241 West 36th St.  
 Burtan Embroidery Novelty Co., 325 West 37th St.  
 Caltabiano Embroideries, 575 Eighth Ave.  
 Colonial Embroidery Co., Inc., 320 West 37th St.  
 Columbia Embroidery Works, 315 West 36th St.  
 Continental Hand Drawn Works, Inc., 256 West 38th St.  
 Dainty Emb. & Stehg. Co., Inc., 307 West 38th St.  
 Davcoe Embroidery, Inc., 589 Eighth Ave.  
 Decor Embroidery, 250 West 40th St.  
 Du Rite Pltg. & Stehg. Co., 209 West 38th St.  
 Elite Embroidery Works, Inc., 323 West 39th St.  
 Phil Finkelstein Emb. Co., Inc., 234 West 39th St.  
 Frances Novelty Co., Inc., 535 Eighth Ave.  
 Frank & Kaye, Inc., 344 West 38th St.  
 Geller Scall. & Novelty Co., Inc., 307 West 38th St.  
 Hauser Embroidery Works, 264 West 40th St.  
 Albert Iannone Embroidery, 260 West 39th St.  
 [fol. 29] Industrial Stehg. Co., 29 West 38th St.  
 Iris Novelty Co., 159 West 27th St.  
 J. R. Novelty Co., 25 West 38th St.  
 Jay-Cee Embroidery Co., 336 West 37th St.  
 George Kaplan, 57 West 38th St.  
 J. M. Kleinman Co., 265 West 40th St.  
 Kramer Embroideries, 256 West 38th St.  
 L. S. Embroidery Co., 64 West 23rd St.  
 La Gene Embroidery Co., Inc., 218 West 34th St.  
 La Penne Embroidery Co., 323 West 39th St.  
 Lily Embroidery Works, Inc., 264 West 40th St.  
 Meyerson Brothers, 48 West 37th St.  
 Modern Pleating Co., 330 West 38th St.  
 New Embroidery Co., Inc., 264 West 40th St.  
 Oreol Embroidery Co., Inc., 307 West 38th St.  
 Orloff Sons, 48 West 38th St.  
 Pastore Emb. Co., 355 West 36th St.  
 Charles Paul Emb. Works, 158 West 27th St.  
 Public Art Embroidery, 29 West 38th St.  
 Regal Art Novelty Co., 263 West 40th St.  
 Roman Art Emb. Co., 112 West 30th St.

Rite Capital Pltg. & Stehg. Co., 230 West 39th St.

Dino Rossini, 545 Eighth Ave.

Mufe. Sabo, Inc., 341 West 38th St.

Senate Emb. Works, Inc., 315 West 36th St.

Silver Emb. Works, 257 West 39th St.

Star Pltg. Corp., 575 Eighth Ave.

H. Stein, 323 West 39th St.

Oscar Stern, Inc., 307 West 38th St.

[fol. 30] Surprise Art Embroidery Co., Inc., 519 Eighth Ave.

Service Trading Corp., 257 West 38th St.

Thomasian Emb. Co., 330 West 38th St.

Trimore Embroidery Co., 336 West 37th St.

Van-Mar Emb. Co., 118 West 27th St.

Vogue Pltg. & Emb. Co., 313 West 37th St.

F. Wilkes Embroidery, 62 West 47th St.

Worth Pltg. & Stehg. Co., Inc., 209 West 38th St.

I. Zable, 270 West 38th St.

[fol. 31] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE  
SECOND CIRCUIT

MILDRED MARETZO; MARY FRANKS; FRANCES GIAcone; SALVATORE CALTABIANO and ATTILIO CALTABIANO, co-partners doing business under the firm name and style of Caltabiano Embroideries; ABRAHAM FRIEDENSOHN and ISADORE FRIEDENSOHN, co-partners doing business under the firm name and style of Public Art Embroidery; GEORGE KAPLAN; JULIUS BRODY, doing business under name and style of Brody Embroidery Co.; DAVID GOLDFARB doing business under the name and style of DECOR EMBROIDERY; MOE MEYERSON, PERRY MEYERSON and HENRY MEYERSON, co-partners doing business under the firm name and style of MEYERSON BROTHERS; VEIL DOTTERS ASSOCIATION OF AMERICA, INC., on behalf of itself and all its members producing or manufacturing embroideries and embellishing veils; and PLEATERS, STITCHERS & EMBROIDERERS ASS'N., INC., on behalf of itself and all its members producing or manufacturing embroideries, Petitioners-Appellants,

against

L. METCALFE WALLING, Administrator, Wage and Hour Division, United States Department of Labor, Respondent.

NOTICE OF APPEAL

SIR:

Notice is hereby given that Mildred Maretzo, Mary Franks, Frances Giaccone, Salvatore Caltabiano and Attilio Caltabiano, co-partners doing business under the firm name and style of Caltabiano Embroideries, Abraham Frieden-[fol. 32] sohn and Isadore Friedensohn, co-partners doing business under the firm name and style of Public Art Embroidery, George Kaplan, Julius Brody, doing business under name and style of Brody Embroidery Co., David Goldfarb doing business under the name and style of Decor Embroidery, Moe Meyerson, Perry Meyerson and Henry Meyerson, co-partners doing business under the firm name and style of Meyerson Brothers, Veil Dotters Association of America, Inc., on behalf of itself and all its members producing or manufacturing embroideries and embellishing veils, and Pleaters, Stitchers & Embroiders Ass'n., Inc. on behalf of itself and all its members producing or manu-

facturing embroideries, petitioners-appellants above named, hereby appeal to the Circuit Court of Appeals for the Second Circuit from the order of L. Metcalfe Walling, Administrator, Wage and Hour Division, United States Department of Labor, appearing in the Federal Register on or about the 2nd day of September, 1943, insofar as the said order restricts homework in the embroideries industry.

Dated, New York, October 20th, 1943.

Yours, etc. Brower, Brill & Tompkins, Attorneys for  
Petitioners-Appellants, Office & P. O. Address, 165  
Broadway, Borough of Manhattan, City of New  
York.

To: Hon. L. Metcalfe Walling, Administrator, Wage &  
Hour Division, United States Department of Labor, New  
York, N. Y.

[fol. 33]

**PETITION FOR REVIEW**

**UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND  
CIRCUIT**

GEMSCO, INC., VANGUARD MILITARY EQUIPMENT CO., S. MARS,  
INC., HERTZ & COMPANY, TUBELL & COMPANY, HILBORN-  
HAMBURGER, INC. and G. HIRSCH SONS, INC., Petitioners,

against

L. METCALFE WALLING, Administrator of Wage and Hour  
Division, United States Department of Labor, Respond-  
ent

*To the Honorable, the Judges of the Second Circuit:*

Comes now, Gemasco, Inc., Vanguard Military Equip-  
ment Co., S. Mars, Inc., Hertz & Company, Tubell & Com-  
pany, Hilborn-Hamburger, Inc., and G. Hirsch Sons, Inc., on  
behalf of themselves, and the respective successors of each  
of the foregoing, and of each and every officer, director  
and partner thereof, all with the same force and effect as  
if all of the said petitioners were specifically named herein,  
and petition this Honorable Court to review and set aside  
as to all of the petitioners, the order of Hon. L. Metcalfe  
Walling, Administrator of Wage and Hour Division, re-  
stricting and prohibiting industrial home work, which order

is dated the 21st day of August, 1943, and was filed September 1, 1943 and is hereinafter referred to as the "order of the Administrator".

In support of the petition, the following is shown to this Honorable Court:

[fol. 34]

## I

That your petitioners are engaged in the hereinafter described business and have their principal places of business in the City, County and State of New York, within the Second Circuit of the United States Circuit Court of Appeals.

The names and addresses of the petitioners are as follows:

Gemsco, Inc., 395—4th Avenue;  
 Vanguard Military Equipment Co., 135 Madison Avenue;  
 S. Mars, Inc., 65—4th Avenue;  
 Hertz & Company, 753 Broadway;  
 Tubell & Company, 25 Waverly Place;  
 Hilborn-Hamburger, Inc., 15 East 26th Street;  
 G. Hirsch Sons, Inc., 119 West 40th Street;

That at the time of the hearings hereinafter mentioned, your petitioners were and still are engaged in the business of manufacturing separate and independent articles, namely, military insignia, emblems and devices upon which insignia, emblems and devices bullion embroidery work is applied by the above petitioners who manufacture the said articles.

## II

Under the authority of Section 10 of the Fair Labor Standards Act of 1938 (Title 29 of the United States Code, Section 210) the United States Court of Appeals for the Second Circuit has jurisdiction of the parties and the subject matter herein involved and to give the relief prayed for in this petition.

## III

On June 6, 1942, by Administrative Order No. 145, the Administrator, pursuant to Sections 5 and 8 of the Fair [fol. 35] Labor Standards Act of 1938 (Title 29 of the United States Code, Sections 205 and 208) appointed In-

dustry Committee #45 for the embroideries industry and directed the said Committee to recommend minimum wage rates for the embroaderies industry. On June 30, 1942, said Industry Committee #45 filed its report with the Administrator, recommending a minimum wage rate of forty cents an hour in the embroideries industry. No recommendation whatsoever was contained in the said Committee's report relative to any restriction, regulation or prohibition of home work by employees engaged in the said industry.

On November 2, 1942, public hearings were held before Major Robert N. Campbell, the presiding officer designated by Hon. L. Metcalfe Walling, Administrator of Wage and Hour Division (hereinafter referred to as "Administrator"), which public hearings were held pursuant to a notice previously published by the Administrator reciting that the purpose of the hearing was to take evidence on the following questions:

1. Whether the recommendation of Industry Committee No. 45 should be approved or disapproved.

2. In the event an order is issued approving the recommendation, what, if any, prohibition, restriction, or regulation of home work in this industry is necessary to carry out the purpose of such order, to prevent the circumvention or evasion thereof, and to safeguard the minimum wage rate established therein.

#### IV

At the outset of the above mentioned public hearings of the Administrator, the parties appearing thereat openly consented to the issuance of an order establishing the minimum wage rate recommended by said Industry Committee as the minimum wage rate for said industry leaving for determination only the question as to whether any order could or should be issued by the said Administrator restricting, regulating or prohibiting industrial home work in the said industry.

[fol. 36]

#### V

At the opening and at the close of the above mentioned public hearings, motions were made on behalf of the peti-

tioners herein to dismiss the hearing with respect to them on various grounds including the following:

1. That the Fair Labor Standards Act of 1938 does not authorize the Administrator to restrict and prohibit industrial home work.

2. That the uncontradicted evidence conclusively established that the industry in which the petitioners are engaged in was not included in the definition of the Embroideries Industry as established and promulgated by the Administrator.

3. That by the terms of the Statute, the Administrator was limited to accepting or rejecting the recommendations of the said Industry Committee, which recommendations did not include any reference to the performance of home work by employees engaged in the Embroideries Industry.

The Presiding Officer overruled the motions on the ground that he had no authority to dismiss the proceedings.

## V I

On or before January 19, 1943, the petitioners herein filed a brief in support of their contentions and on the 26th day of January, 1943, pursuant to notice of hearing previously issued, oral argument was held before Hon. L. Metcalfe Walling, Administrator, at which hearing, counsel for petitioners appeared and presented argument in support of their contentions as set forth in their brief.

## V II

Thereafter and on August 21, 1943, the Administrator signed an order which was thereafter filed on September [fol. 37] 1, 1943, restricting and substantially prohibiting industrial home work in the Embroideries Industry, and setting forth that his decision was contained in an opinion entitled "Findings and Opinion of the Administrator In the Matter of the Recommendation of Industry Committee #45 for a Minimum Wage Rate in the Embroideries Industry and industrial home work in the Embroideries Industry". The order further stated that a copy of said Findings and Opinion might be had upon request at the Wage and Hour Division, United States Department of Labor, 165 West 46th Street, New York, New York. Al-

though the petitioners by their attorneys have made repeated requests at the place indicated in the order, both in person and by mail, and at the main office of the Administrator at Washington, D. C., for a copy of the said Findings and Opinion, no copy of the said Findings and Opinion has been forthcoming from the said Wage and Hour Division to date hereof.

### VIII

The order of the Administrator, among other things, provided for the adoption of the Industry Committee's recommendations establishing a forty cent per hour minimum wage rate to be paid by every employer to each of his employees in the Embroideries Industry and restricted industrial home work to the care of a worker who, because of age or physical or mental disability is unable to adjust himself or herself to factory work, or whose presence in the home is required because of the necessity of caring for an invalid. This restriction is tantamount to almost total prohibition.

### IX

The order of the Administrator defines Embroideries Industry as follows:

[fol. 38] "The production of all kinds of hand and machine-made embroideries and ornamental stitchings, including, but not by way of limitation, tucking, shirring, smocking, hemstitching, hand rolling, fagoting, Bonnaz embroidery, appliqueing, crochet beading, hand drawing, machine drawing, rhinestone trimming, sequin trimming, spangle trimming, eyelets, passementerie, pleating, the application of rhinestones and nailheads, stamping and perforating of designs, Schiffi embroidery and laces, burnt-out laces and velvets, Swiss hand-machine embroidery, thread splitting, embroidery thread cutting, scallop cutting, lace cutting, lace making-up, making-up of embroidered yard goods, straight cutting of embroidery and cutting out of embroidery, embroidery trimmings, bindings (not made in textile establishments), pipings and emblems: *Provided, however*, That (1) the foregoing when produced or performed by a manufacturer of a garment, fabric or other article for use on such garment, fabric or

other article, and (2) the manufacture of covered buttons and buckles, shall not be included."

The aforesaid order of the Administrator dated the 21st day of August, 1943, and filed on the 1st day of September, 1943, is erroneous in fact and in law and ought to be reviewed and set aside by this Honorable Court for the following reasons:

1. That the Administrator failed to grant the petitioners' motion to dismiss the case at the conclusion of the hearings.

2. That the Administrator had no authority under the Fair Labor Standards Act of 1938 to prohibit, or to restrict industrial home work.

3. That the order of the Administrator is unsupported by findings of fact.

[fol. 39] 4. That the Administrator failed to find in accordance with the proof that the petitioners were manufacturers of military and naval insignia devices as separate articles upon which their operations were performed and which were excluded by the definition of Embroideries Industry as set forth in Administrative Order #145 and in the order of the Administrator.

5. That the said order of the Administrator exceeded the authority of the Administrator under Section 8 of the Fair Labor Standards Act of 1938 in that it was not confined to an approval or disapproval of Industry Committee #45, which recommendations did not include any restriction of industrial home work.

6. That the evidence adduced at the hearings clearly established that under the Fair Labor Standards Act of 1938: (a) The restriction of industrial home work was and is not necessary to safeguard the minimum wage rate established by the said order of the Administrator since no evasion of the Minimum Wage Order on the part of the petitioners was proven; and (b) Such restriction of industrial home work would substantially curtail employment in the industry.

Wherefore, for the reasons aforesaid, the decision and order of the Administrator, dated the 21st day of August,

1943, and filed on the 1st day of September, 1943, are erroneous and without basis in law and fact and the petitioners pray that the said Administrator be required to certify and file in this Court a transcript of the record of the proceedings before it together with all the original exhibits introduced in evidence by the parties to the proceedings and that upon the filing of such transcript and exhibits, this Court shall proceed forthwith as provided by law to review such decision and order and set aside and dismiss, as against the petitioners herein, such parts of the [fol. 40] said order as restrict, regulate and prohibit industrial home work.

Dated, New York, October 20th, 1943.

Gemsco, Inc., by Irving Gordon, Treas.; Vanguard Military Equipment Co., by Mack Gershen, Partner; S. Mars, Inc., by S. Mars, Pres.; Hertz & Company, by Max Hertz, Tubell & Company, by Nathan Tubell, Partner; Hilborn-Hamburger, Inc., by J. M. Hilborn, Pres.; G. Hirsch Sons, Inc., by Morton T. Hirsch, Treas., Petitioners. Weisman, man, Quinn, Allan & Spett, by Samuel A. Allan, a Member of the Firm, Attorneys for Petitioners, Office & P. O. Address, 1450 Broadway, Borough of Manhattan, City of New York.

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[fol. 41] STATE OF NEW YORK,  
City of New York,  
County of New York, ss:

Irving Gordon, being duly sworn, deposes and says that he is the Treasurer of Gemsco, Inc., the corporation named in the within entitled proceeding and one of the Petitioners therein; that he has read the foregoing Petition and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

Deponent further says that the reason this verification is made by deponent and not by the Gemsco, Inc. is because

the said Gemsco, Inc. is a New York corporation, and deponent an officer thereof, to wit, its Treasurer.

Irving Gordon.

Sworn to before me, this 20th day of October, 1943.  
 Samuel Goldberg, Notary Public, Queens Co. No.  
 845, Reg. No. 547. Cert. Filed in N. Y. Co. No.  
 266, Reg. No. 4G146. Commission Expires March  
 30, 1944. (Seal.)

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[fol. 42] STATE OF NEW YORK,  
 City of New York,  
 County of New York, ss:

Mack Gershen, being duly sworn, deposes and says that he is a member of the firm of Vanguard Military Equipment Co., one of the Petitioners in the within proceeding; that he has read the foregoing Petition and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

Mack Gershen.

Sworn to before me, this 20th day of October, 1943.  
 Samuel Goldberg, Notary Public, Queens Co. No.  
 845, Reg. No. 547. Cert. Filed in N. Y. Co. No. 266,  
 Reg. No. 4G146. Commission Expires March 30,  
 1944. (Seal.)

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[fol. 43] STATE OF NEW YORK,  
 City of New York,  
 County of New York, ss:

S. MARS, being duly sworn, deposes and says that he is the President of S. Mars, Inc., the corporation named in the within entitled proceeding and one of the Petitioners therein; that he has read the foregoing Petition and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters therein stated to be

alleged upon information and belief, and as to those matters he believes it to be true.

Deponent further says that the reason this verification is made by deponent and not by the S. Mars, Inc. is because the said S. Mars, Inc. is a New York corporation, and deponent an officer thereof, to wit, its President.

S. Mars.

Sworn to before me, this 20th day of October, 1943.  
Samuel Goldberg, Notary Public, Queens Co. No.  
845, Reg. No. 547. Cert. Filed in N. Y. Co. No.  
266, Reg. No. 4G146. Commission Expires March  
30, 1944. (Seal.)

[fol. 44] STATE OF NEW YORK,  
City of New York,  
County of New York, ss:

MAX HERTZ, being duly sworn, deposes and says that he is a member of the firm of Hertz & Company, one of the Petitioners in the within proceeding; that he has read the foregoing Petition and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

Max Hertz.

Sworn to before me, this 20th day of October, 1943.  
Samuel Goldberg, Notary Public, Queens Co. No.  
845, Reg. No. 547. Cert. Filed in N. Y. Co. No.  
266, Reg. No. 4G146. Commission Expires March  
30, 1944. (Seal.)

[fol. 45] STATE OF NEW YORK,  
City of New York,  
County of New York, ss:

NATHAN TUBELL, being duly sworn, deposes and says that he is a member of the firm of Tubell & Company, one of the Petitioners in the within proceeding; that he has read the foregoing Petition and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

Nathan Tubell.

Sworn to before me, this 20th day of October, 1943.  
 Samuel Goldberg, Notary Public, Queens Co. No.  
 845, Reg. No. 547. Cert. Filed in N. Y. Co. No. 266,  
 Reg. No. 4G146. Commission Expires March 30,  
 1944. (Seal.)

[fol. 46] STATE OF NEW YORK,  
 City of New York,  
 County of New York, ss:

J. M. HILBORN, being duly sworn, deposes and says that he is the President of Hilborn-Hamburger, Inc., the corporation named in the within entitled proceeding and one of the Petitioners therein; that he has read the foregoing Petition and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

Deponent further says that the reason this verification is made by deponent and not by the Hilborn-Hamburger, Inc. is because the said Hilborn-Hamburger, Inc. is a New York corporation, and deponent an officer thereof, to wit, its President.

J. M. Hilborn.

Sworn to before me, this 20th day of October, 1943.  
 Samuel Goldberg, Notary Public, Queens Co. No.  
 845, Reg. No. 547. Cert. Filed in N. Y. Co. No. 266,  
 Reg. No. 4G146. Commission Expires March 30,  
 1944. (Seal.)

[fol. 47] STATE OF NEW YORK,  
 City of New York,  
 County of New York, ss:

MORTON T. HIRSCH, being duly sworn, deposes and says that he is the Treasurer of G. Hirsch Sons, Inc., the corporation named in the within entitled proceeding and one of the Petitioners therein; that he has read the foregoing Petition and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

Deponent further says that the reason this verification is made by deponent and not by the G. Hirsch Sons, Inc.

is because the said G. Hirsch Sons, Inc. is a New York corporation, and deponent an officer thereof, to wit, its Treasurer.

Morton T. Hirsch, Treas.

Sworn to before me, this 20th day of October, 1943.  
 Samuel Goldberg, Notary Public, Queens Co. No. 845, Reg. No. 547. Cert. Filed in N. Y. Co. No. 266, Reg. No. 4G146. Commission Expires March 30, 1944. (Seal.)

[fol. 48]

### NOTICE OF APPEAL

#### UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

GEMSCO, INC., VANGUARD MILITARY EQUIPMENT CO., S. MARS, INC., Hertz & Company, Tubell & Company, Hilborn-Hamburger, Inc. and G. Hirsch Sons, Inc., Petitioners,  
 against

L. METCALFE WALLING, Administrator of Wage and Hour Division, United States Department of Labor, Respondent

Notice is hereby given that the above named petitioners appeal from such parts of the order of L. Metcalfe Walling, Administrator of Wage and Hour Division, United States Department of Labor, dated the 21st day of August, 1943 and filed on the 1st day of September, 1943, as restricts, regulates and prohibits industrial homework in the embroidery industry, said appeal being taken to the United States Circuit Court of Appeals for the Second Circuit.

Dated, N. Y., Oct. 22, 1943.

Yours, etc., Weisman, Quinn, Allan & Spett, by  
 Samuel S. Allan, A Member of the Firm, Attorneys for Petitioner, Office & P. O. Address, 1450 Broadway, Borough of Manhattan, City of New York.

[fol. 49] To: L. Metcalfe Walling, Esq., Administrator Wage & Hour Division, United States Department of Labor, 165 West 46th Street, New York City. Kenneth Meikeljohn, Esq., Solicitor, U. S. Department of Labor, 165 West 46th Street, New York City.

[fol. 33] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR  
THE SECOND CIRCUIT

GEMSCO, INC., VANGUARD MILITARY EQUIPMENT CO., S. MARS,  
INC., Hertz & Company, Tubell & Company, Hilborn-  
Hamburger, Inc. and G. Hirsch Sons, Inc., Petitioners,  
against

L. METCALFE WALLING, Administrator of Wage and Hour  
Division, United States Department of Labor, Respond-  
ent

STATEMENT UNDER RULE 13

This is a petition to review a Wage Order of the Administrator of the Wage and Hour Division of the United States Department of Labor. The proceeding was commenced on June 6, 1942 by Order No. 145, made on that date, pursuant to Sections 5 and 8 of the Fair Labor Standards Act of 1938, which order appointed Industry Committee No. 45 for the Embroideries Industry, and directed said Committee to recommend minimum wage rates for said industry in accordance with Section 8 of said Act. Said Committee, on June 30, 1942, after investigation, filed a report with the Administrator. Said Administrator directed that public hearings be held and the notice of hearing, dated September 6, 1942, was duly published.

Public hearings before Major Robert N. Campbell, presiding officer designated by Honorable L. Metcalfe Walling, Administrator of the Wage and Hour Division, were held [fol. 34] from November 2, 1942 to November 13, 1942, pursuant to said notice. The record of these hearings was transmitted to Honorable L. Metcalfe Walling, the Administrator of the Wage and Hour Division. Oral argument was heard on January 26, 1943, before the Administrator. The order of the Administrator establishing a 40 cents minimum wage rate in the embroideries industry, as recommended by the Industry Committee No. 45, and also restricting and prohibiting industrial homework in the industry, was dated August 21, 1943 and filed by the Administrator on September 1, 1943. The Findings and Opinion of the Administrator is dated August 21, 1943. The petition for review of Gemsco, Inc., et al. was filed on September 26, 1943.

There has been no change of parties herein.

## WAGE ORDER AS AMENDED

Effective September 20, 1943

## Part 633—Minimum Wage Rate in the Embroideries Industry

In the matter of the recommendation of Industry Committee No. 45 for a minimum wage rate in the Embroideries Industry.

Whereas on June 6, 1942, by Administrative Order No. 145, the Administrator, acting pursuant to sections 5 and 8 of the Fair Labor Standards Act of 1938, appointed Industry Committee No. 45 for the Embroideries Industry, and directed the Committee to recommend minimum wage rates for the Embroideries Industry in accordance with section 8 of the Act; and

Whereas the Committee included four disinterested persons representing the public, a like number of persons representing employers in the Embroideries Industry, and a [fol. 35] like number representing employees in the industry, and each group was appointed with due regard to the geographical regions in which the Embroideries Industry is carried on; and

Whereas Industry Committee No. 45, on June 30, 1942, after investigation of conditions in the Industry, filed with the Administrator a report containing its recommendations for a minimum wage rate of 40 cents an hour in the Embroideries Industry; and

Whereas after notice published in the Federal Register on September 16, 1942, Major Robert N. Campbell, the Presiding Officer designated by the Administrator, held a public hearing commencing on November 2, 1942 and continuing through November 13, 1942, at New York, New York, upon the Committee's recommendation and upon the question of what, if any, prohibition, restriction or regulation of home work is necessary to carry out the purposes of the wage order for the Embroideries Industry, to prevent the circumvention or evasion thereof and to safeguard the minimum wage rate established therein, ~~is~~ the event an order is issued approving the recommendations of the Committee, at which all interested persons were given an opportunity to be heard; and

Whereas the complete record of the proceeding before the Presiding Officer was transmitted to the Administrator; and

Whereas pursuant to notice published in the Federal Register on December 29, 1942, all persons who appeared at the hearing were given leave to file briefs on or before January 19, 1943; and

Whereas pursuant to notice published in the Federal Register on December 29, 1942, oral argument by persons who appeared at the hearing was heard by the Administrator on January 26, 1943; and

Whereas the Administrator, upon reviewing all the evidence adduced in this proceeding and giving consideration [fol. 36] to the provisions of the Act with special reference to sections 5 and 8, has concluded that the Industry Committee's recommendation for a minimum wage rate for the Embroideries Industry, as defined in Administrative Order No. 145, is made in accordance with law, is supported by the evidence adduced at the hearing, and, taking into consideration the same factors as are required to be considered by the Industry Committee, will carry out the purposes of section 8 of the Act, and that it is necessary to include terms and conditions in the wage order for this Industry with respect to industrial home work to carry out the purpose of such order, to prevent the circumvention of evasion thereof and to safeguard the minimum wage rate established therein; and

Whereas the Administrator has set forth his decision in an opinion entitled Findings and Opinion of the Administrator in the Matter of the Recommendation of Industry Committee No. 45 for a Minimum Wage Rate in the Embroideries Industry and Industrial Home Work in the Embroideries Industry dated this day, a copy of which may be had upon request addressed to the Wage and Hour Division, United States Department of Labor, 165 West 46th Street, New York, New York;

Now, therefore, *It is ordered, That:*

§ 633.1 *Approval of recommendation of industry committee.* The Committee's recommendation is hereby approved, and, in accordance with such recommendation,

§ 633.2 *Wage rate.* Wages at a rate of not less than 40 cents an hour shall be paid under section 6 of the Fair

Labor Standards Act of 1938 by every employer to each of his employees in the Embroideries Industry who is engaged in commerce or in the production of goods for commerce.

§ 633.3 *Restriction of home work.* No work in the Embroideries Industry, as defined herein, shall be done in or about a home, apartment, tenement, or room in a residential establishment after November 15, 1943,\* except by such persons as have obtained special home work certificates issued pursuant to applicable regulations of the Wage and Hour Division, authorizing industrial home work by a worker who—

(1) (a) Is unable to adjust to factory work because of age or physical or mental disability; or

(b) Is unable to leave home because his presence is required to care for an invalid in the home; and

(2) (a) Was engaged in industrial home work in the Industry, as defined, prior to November 2, 1942 (except that if this requirement shall result in unusual hardship to the individual home worker it shall not be applied); or

(b) Is at any time engaged in such industrial home work under the supervision of a State Vocational Rehabilitation Agency or of a Sheltered Work Shop, as defined in § 525.1, Part 525, Chapter V, Title 29, Code of Federal Regulations.

§ 633.4 *Posting of notices.* Every employer employing any employees engaged in commerce or in the production of goods for commerce in the Embroideries Industry shall [fol. 38] post and keep posted in a conspicuous place in each department of his establishment where such employees are working such notices of this order as shall be prescribed from time to time by the Wage and Hour Division of the United States Department of Labor.

§ 633.5 *Definition of the Embroideries Industry.* The Embroideries Industry, to which this order shall apply, is hereby defined as follows:

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\* The effective date was postponed to March 31, 1944 by order of the Administrator filed November 8, 1943. 8 Federal Register 15362.

The production of all kinds of hand and machine-made embroideries and ornamental stitchings, including, but not by way of limitation, tucking, shirring, smocking, hem-stitching, hand rolling, fagoting, Bonnaz embroidery, appliqueing, crochet beading, hand drawing, machine drawing, rhinestone trimming, sequin trimming, spangle trimming, eyelets, passementerie, pleating, the application of rhinestones and nailheads, stamping and perforating of designs, Schiffli embroidery and laces, burnt-out laces and velvets, Swiss hand-machine embroidery, thread splitting, embroidery thread cutting, scallop cutting, lace cutting, lace making-up, making-up of emboidered yard goods, straight cutting of embroidery and cutting out of embroidery, embroidery trimmings, bindings (not made in textile establishments), pipings and emblems: *Provided, however*, That (1) the foregoing when produced or performed by a manufacturer of a garment, fabric or other article for use on such garment, fabric or other article, and (2) the manufacture of covered-buttons and buckles, shall not be included.

§ 633.6 *Scope of the definition.* The definition of the Embroideries Industry covers all occupations in the industry which are necessary to the production of the articles specified in the definition, including clerical, maintenance, ship-[fol. 39] ping and selling occupations: *Provided, however*, That where an employee covered by this definition is employed during the same workweek at two or more different minimum rates of pay, he shall be paid the highest of such rates for such workweek unless records concerning his employment are kept by his employer in accordance with applicable regulations of the Wage and Hour Division.

§ 633.7. *Effective date.* This wage order shall become effective September 20, 1943.

Signed at New York, New York, this 21st day of August, 1943. Section 633.1 to 633.7 inclusive, issued under the authority contained in Section 8, 52 Stat. 1060, 1064; 29 U. S. C., Sec. 208.

L. Metcalfe Walling, Administrator Wage and Hour Division United States Department of Labor.

Published in Federal Register September 2, 1943.

[fol. 40] WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, NEW YORK, NEW YORK

In the Matter of The Recommendation of Industry Committee No. 45 for a Minimum Wage Rate in the Embroideries Industry and Industrial Home Work in the Embroideries Industry

FINDINGS AND OPINION OF ADMINISTRATOR—August 21, 1943 <sup>1</sup>

This is a proceeding pursuant to Section 8 of the Fair Labor Standards Act of 1938 (herein called the Act), to determine whether the 40-cents-per-hour minimum wage recommendation of Industry Committee No. 45 for the Embroideries Industry (herein called the Committee) shall be approved and carried into effect.

By Administrative Order No. 145,<sup>2</sup> issued pursuant to Section 5(b) of the Act, on June 6, 1942 I appointed Industry Committee No. 45 for the Embroideries Industry "to investigate conditions in the industry and recommend to the Administrator minimum wage rates for all employees [fol. 41] thereof" who are subject to the Act.<sup>3</sup> Industry Committee No. 45 was convened on June 30, 1942, and on that date by the unanimous vote of its members, made the following recommendation:

Wages at a rate of not less than 40 cents an hour shall be paid under Section 6 of the Fair Labor Standards Act of 1938 by every employer to each of his employees

<sup>1</sup> For the benefit of the reader, footnotes in this Opinion make reference to certain relevant portions of the record. These findings, however, are based upon the entire record, not solely upon the portions cited or referred to. Reference to the transcript of the public hearing held before Major Robert N. Campbell, as Presiding Officer, on November 2 through November 7, and November 10 through November 13, 1942, inclusive, are cited throughout this Opinion by the letter "R."

<sup>2</sup> Administrator's Exhibit 1-A.

<sup>3</sup> Employees exempted by virtue of the provisions of Section 13(a) of the Act and employees coming under the provisions of Section 14 were excluded from the Committee's consideration by express language in paragraph 4 of Administrative Order No. 145 (Administrator's Exhibit 1-A).

in the Embroideries Industry (as defined in Administrative Order No. 145) who is engaged in commerce or in the production of goods for commerce.<sup>4</sup>

On June 30, 1942, pursuant to Section 511.19 of the regulations applicable to industry committees,<sup>5</sup> the Report and Recommendation of the Committee was transmitted to me.<sup>6</sup> The Committee's records were transmitted to me on July 13, 1942, in accordance with Section 511.20 of the aforesaid regulations.<sup>7</sup>

Pursuant to Section 8(d) of the Act and upon due notice published in the Federal Register on September 16, 1942,<sup>8</sup> a public hearing was held before Major Robert N. Campbell, as Presiding Officer, on November 2 through November 7, and November 10 through November 13, 1942, in New York, New York.

[fol. 42] Extensive testimony was given, and many exhibits were received in evidence. All interested persons were given an opportunity to submit evidence on the following questions:

1. Whether the recommendation of Industry Committee No. 45 should be approved or disapproved;

2. In the event an order is issued approving the recommendation, what, if any, prohibition, restriction, or regulation of home work in this industry is necessary to carry out the purpose of such order, to prevent the circumvention or evasion thereof, and to safeguard the minimum wage rate established therein.

At this hearing evidence relating to conditions affecting the Committee's recommendation with respect to the Embroideries Industry and its various branches was submitted by a representative of the staff of the Wage and Hour Divi-

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<sup>4</sup> Administrator's Exhibit 1-D.

<sup>5</sup> Title 29, c. V, Part 511, Code of Federal Regulations (Administrator's Exhibit 1-E).

<sup>6</sup> Administrator's Exhibit 1-G.

<sup>7</sup> Administrator's Exhibit 1-H.

<sup>8</sup> Administrator's Exhibit 1-F; 7 F. R. 7295.

sion, United States Department of Labor.<sup>9</sup> Appearing in favor of the recommendation were representatives of labor unions and trade associations, as well as individual employers in the Industry.<sup>10</sup> Opposition to the recommendation was voiced on behalf of an employer in the art needle-[fol. 43] work branch of the Industry.<sup>11</sup> The public hearing in this proceeding consumed ten days, and the transcript of its proceedings contains 1691 pages. Evidence with respect to industrial home work was voluminous and occupies by far the greater part of the record.<sup>12</sup> Insofar as the question is before me, I find that all persons who desired to present evidence with reference to the questions under consideration were given a full and fair opportunity to be heard.

There were made a part of the record for the purpose of indicating the Committee's procedure, the journal of the Committee,<sup>13</sup> a transcript of the meeting and the exhibits and data submitted to the Committee,<sup>14</sup> and copies of ad-

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\* Verl E. Roberts, Acting Chief of the Industry Committee Studies Section of the Economics Branch, Wage and Hour Division, United States Department of Labor, appeared on behalf of the Administrator.

<sup>10</sup> Appearances in support of the Committee's recommendation were made by the following employer associations and individual employers: David B. Cherashore, Counsel, Pleaters, Stitchers and Embroiderers Association, Inc., Philadelphia, Pennsylvania (R. 74); Norman Kaliski, Counsel, Pleaters, Stitchers and Embroiderers Association, Inc., New York, New York (R. 75); Samuel S. Allan, Counsel for manufacturers of military and naval insignia devices for officers (R. 75). Also appearing in support of the recommendation was Nathan Weinberg, Associate Economist, International Ladies' Garment Workers' Union (R. 68).

<sup>11</sup> Joseph L. McCormack, Counsel, Fixler Bros., Chicago, Illinois, contended that a 40-cent minimum would be too high in the Chicago area for stenographers, errand boys, and shipping clerks at a time when the country was not at war (R. 77).

<sup>12</sup> See Part B, *infra*.

<sup>13</sup> Administrator's Exhibit 1-B.

<sup>14</sup> Administrator's Exhibit 1-C.

ministrative orders, notices, and other relevant items.<sup>15</sup>

Upon the conclusion of the hearing, the complete record of the proceedings was transmitted to me. All parties at the hearing were notified by notice published in the Federal Register on December 29, 1942, that briefs would be received up to January 19, 1943,<sup>16</sup> and that oral argument would be heard on January 26, 1943.<sup>17</sup>

[fol. 44] In the course of the hearing before the Presiding Officer, there were various motions, requests, and objections concerning the inclusion or exclusion of evidence by the several parties to the proceeding.<sup>18</sup> I have reviewed the

<sup>15</sup> Administrator's Exhibits 1-A, 1-E, 1-F, 1-G, 1-H, 1-I.

<sup>16</sup> 7 F. R. 11029. This notice superseded a notice published on December 18, 1942 (7 F. R. 10586), setting the date for filing briefs as January 11, 1943, and the date of oral argument as January 15, 1943.

Briefs were filed supporting the Committee's minimum wage recommendation but opposing the restriction or prohibition of industrial home work in the Industry on behalf of the National Hand Embroiderers and Novelty Manufacturers Association and Associated Manufacturers of Tubular Pippings and Trimmings, Inc., New York, New York; Pleaters, Stitchers and Embroiderers Association, Inc., New York, New York; Pleaters, Stitchers and Embroidery Manufacturers Association, Chicago, Illinois; and manufacturers of military and naval insignia devices.

<sup>17</sup> Oral argument was restricted, in accordance with the request of the parties, to the home work question. Oral argument was offered by Norman Kaliski, Counsel, on behalf of the Pleaters, Stitchers and Embroiderers Association, Inc., New York, New York; Solomon S. Friedman, Counsel, on behalf of the National Hand Embroiderers and Novelty Manufacturers Association and Associated Manufacturers of Tubular Pippings and Trimmings, Inc., New York, New York; Samuel S. Allan, Counsel on behalf of manufacturers of military and naval insignia devices, New York, New York; and Elias Lieberman, Counsel, on behalf of the International Ladies' Garment Workers' Union, New York, New York.

<sup>18</sup> Samuel S. Allan, Counsel for the manufacturers of military and naval insignia devices, moved to dismiss the hearing with respect to his clients on the ground that the work

actions and rulings of the Presiding Officer on these various matters and find no prejudicial error therein. Insofar as may be necessary to the findings and conclusions herein, and except for those which are inconsistent with the findings, conclusions, and order set forth below, I hereby affirm them.

I have reviewed, considered, and appraised the entire record, read the briefs submitted, and consulted with subordinates who have reviewed and analyzed the record and the briefs. Upon all the evidence, I make the following findings, conclusion, and order:

[fol. 45]

A

### Minimum Wage Recommendation of Industry Committee No. 45

#### I. Definition of the Embroideries Industry

Administrative Order No. 145, dated June 6, 1942, which appointed the Committee, defined the Industry as follows:

The production of all kinds of hand and machine-made embroideries and ornamental stitchings, including, but not by way of limitation, tucking, shirring, smocking, hemstitching, hand rolling, fagoting, Bonnaz embroidery, appliqueing, crochet beading, hand drawing, machine drawing, rhinestone trimming, sequin trimming, spangle trimming, eyelets, passementerie, pleating, the application of rhinestones and nailheads, stamping and perforating of designs, Schiffli embroidery and laces, burnt-out laces and velvets, Swiss hand-machine embroidery, thread splitting, embroidery thread cutting, scallop cutting, lace cutting, lace making-up, making-up of embroidered yard goods, straight cutting of embroidery and cutting out of embroidery,

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performed by such manufacturers does not fall within the Embroideries Industry as defined. This motion is hereinafter considered in the section entitled *Definition of the Embroideries Industry, infra*, pp. —. Various rulings of the Presiding Officer which dealt with motions, requests, and objections to the admissibility of evidence on the question of prohibition, restriction, or regulation of home work in the Industry are discussed in Part B of this Opinion, *infra*, pp. 36-46.

embroidery trimmings, bindings, not made in textile establishments), pipings and emblems; *provided, however*, that (1) the foregoing when produced or performed by a manufacturer of a garment, fabric or other article for use on such garment, fabric or other article, and (2) the manufacture of covered buttons and buckles, shall not be included.<sup>19</sup>

The order further provided:

The definition of the embroideries industry covers all occupations in the industry which are necessary to the [fol. 46] production of the articles specified in the definition, including clerical, maintenance, shipping and selling occupations, *provided, however*, that where an employee covered by this definition is employed during the same workweek at two or more different minimum rates of pay, he shall be paid the highest of such rates for such workweek unless records concerning his employment are kept by his employer in accordance with applicable regulations of the Wage and Hour Division.<sup>20</sup>

This definition does not differ substantially from the definition contained in the wage order which, effective January 27, 1941, established a 37½-cent minimum hourly wage rate for the Embroideries Industry.<sup>21</sup> The scope of the Industry as thus defined and the reasons for the inclusion and exclusion of various processes and articles are set forth in detail in the Findings and Opinion of former Administrator Philip B. Fleming.<sup>22</sup>

The language of the earlier definition has been modified in the new definition to cover specifically the "stamping and perforating of designs." This change has the effect merely of clarifying the inclusion of stamped art goods

<sup>19</sup> Administrator's Exhibit 1-A, paragraph 2.

<sup>20</sup> *Id.*, paragraph 3.

<sup>21</sup> Title 29, c. V, Part 589, Code of Federal Regulations; Administrator's Exhibit 2, p. 1.

<sup>22</sup> *Findings and Opinion of the Administrator in the Matter of the Recommendation of Industry Committee No. 15 for Minimum Wage Rates in the Embroideries Industry* (December 28, 1940), pp. 17-22.

within this Industry. In view of the fact that most embroidery follows a design which has been stamped on the fabric, article, or garment, and since such stamping is a major process in the production of stamped art goods,<sup>23</sup> the Embroideries Industry definition contained in the wage [fol. 47] order of January 27, 1941, has been interpreted as including the stamping and perforating of designs.

The parenthetical clause "not made in textile mills" has the effect of excluding the manufacture of bindings produced in textile establishments.<sup>24</sup>

Samuel S. Allan, Counsel for manufacturers of military and naval insignia devices, moved at the conclusion of the hearing to dismiss the hearing with respect to this group of manufacturers for the following two reasons, among others:

1. \* \* \* that the definition of embroideries as issued by the Administrator and promulgated by him excludes the military embroiderers from the definition and no evidence whatsoever has been offered by the Government or by the proponents to include such embroiderers in this proceeding.
2. \* \* \* that it had been established by the evidence offered on behalf of those embroiderers that they are of a class separate and apart from the embroiderers and crochet beaders coming within the definitions.<sup>25</sup>

The validity of the first of these objections depends upon the construction to be given to that portion of the definition which provides that "(1) the foregoing when produced or performed by a manufacturer of a garment, fabric or other article for use on such garment, fabric or other article \* \* \* shall not be included." The scope and purpose of this clause is discussed at some length in the Findings and Opinion of the Administrator that accompanied the wage

<sup>23</sup> See Administrator's Exhibit 2, p. 1; Administrator's Exhibit 4, p. 2.

<sup>24</sup> Administrator's Exhibit 4, p. 2. Woven bindings produced in textile mills on textile machinery are included in the Textile Industry. Title 25, c. V, Parts 552, 599, and 619, Code of Federal Regulations.

<sup>25</sup> R. 1687.

order establishing a 37½-cent hourly wage for the Embroideries Industry.<sup>26</sup>

[fol. 48] "Emblems" are, in fact, specifically mentioned in the definition as included in the Embroideries Industry. They include embroidered insignia, motifs, or monograms for decoration on military, service, fraternal, and other apparel, caps and hats, or other articles and may be either hand-made or machine-made.<sup>27</sup> It is clear, therefore, that unless military and naval insignia are produced by the manufacturers of the uniforms on which they are to be worn, they are covered by the Embroideries Industry definition.

The evidence in the record does not, in my opinion, sustain the contention that the embroidering of military and naval insignia is excluded from the Industry. On the contrary, although they are produced as distinct and separate items, they derive their sole utility and significance from being attached to and worn upon a uniform. Some non-military embroideries, such as Schiffli and passementerie, are also produced as separate items to be sewn on dresses and other garments.

The embroidery work performed by the concerns on whose behalf the objections to their inclusion in the Embroideries Industry were made is hand work involving the use of gold bullion thread and is classified in the Industry as hand embroidery.<sup>28</sup> While a few concerns specialize at the present time in the hand embroidering of military and naval insignia, this type of work is also performed by concerns which are primarily engaged in other hand embroidery, crochet beading, and other embroidery operations on garments and other articles for civilian use.<sup>29</sup> The degree of skill required by bullion embroidery of military [fol. 49] and naval insignia appears to be somewhat greater than that required in some other types of embroidery

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<sup>26</sup> *Findings and Opinion of the Administrator in the Matter of the Recommendation of Industry Committee No. 15*, pp. 17-18.

<sup>27</sup> Administrator's Exhibit 2, pp. 5, 6.

<sup>28</sup> *Id.*, at 2-9; Sprung, R. 1468.

<sup>29</sup> Sprung, R. 1457-1464, 1468; Orloff, R. 1126, 1127; Friedensohn, R. 1060-1063.

work,<sup>30</sup> but the evidence clearly indicates that it does not require any special or distinctive skill which workers skilled in hand embroidery or crochet beading cannot, with some practice or training, acquire with relative ease.<sup>31</sup> Bullion embroidery is not, of course, limited to military and naval insignia.<sup>32</sup> Some types of insignia require machine embroidery as well as bullion embroidery.<sup>33</sup>

With respect to the second of Mr. Allan's objections, it is likewise clear from the evidence that while the Embroideries Industry produces primarily for manufacturers of apparel and apparel accessories, it also serves producers of shoes, handbags, art linens, upholstery, and similar articles.<sup>34</sup> The criterion of coverage by the definition is the operations performed, not the nature of the articles worked upon. Any concern, other than the manufacturer of the article, fabric, or garment worked upon, which engages in embroidery operations is covered by the definition.<sup>35</sup>

I find, therefore, upon the facts in evidence, that the operations performed by the so-called manufacturers of military and naval insignia are properly regarded as included in the Embroideries Industry. On the basis of all the evidence in the record, I find, taking into consideration [fol. 50] the nature of the Industry, economic and competitive conditions within the Industry, and the competitive relationships between the Industry as defined and other industries, that the definition of the Embroideries Industry as contained in Administrative Order No. 145 is appropriate and in accordance with economic and competitive conditions.

## II. Membership of Industry Committee No. 45

Industry Committee No. 45 for the Embroideries Industry, appointed by Administrative Order No. 145, consisted

<sup>30</sup> Orloff, R. 1124-1126; Friedensohn, R. 1061-1062; see also oral argument, Elias Lieberman, p. 72.

<sup>31</sup> Friedensohn, R. 1061, 1088; Orloff, R. 1126; Franks, R. 806; Pelino, R. 893.

<sup>32</sup> Friedensohn, R. 1088-1090.

<sup>33</sup> Sprung, R. 1468-1474; see also oral argument, Elias Lieberman, pp. 70-72.

<sup>34</sup> Administrator's Exhibit 4, p. 1.

<sup>35</sup> Administrator's Exhibit 2, pp. 2-6; Administrator's Exhibit 4, pp. 2, 3.

of the following representatives of the public and of employers and of employees in the Industry: <sup>36</sup>

*For the Public:*

Max Meyer, Chairman, Sterling National Bank, 1410 Broadway, New York, New York

Clyde E. Dankert, Professor, Economics Department, Dartmouth College, Hanover, New Hampshire

Elizabeth S. Magee, Executive Secretary, The Consumers' League of Ohio, 341 Engineers' Building, Cleveland, Ohio

Kenneth L. M. Pray, Professor of Social Planning and Administration, Pennsylvania School of Social Work, 311 South Juniper Street, Philadelphia, Pennsylvania.

*For the Employees:*

Irving Epstein, Business Agent of Local 252, New York Joint Board, Textile Workers' Union of America, 153 West 33rd Street, New York, New York

Z. L. Freedman, President, Bonnaz, Singer, Hand-Embroiderers, Tuckers, Stitchers and Pleaters' [fol. 51] Union, Local No. 66, International Ladies' Garment Workers' Union, 135 West 33rd Street, New York, New York

Abraham Plotkin, Manager, Embroidery Workers' Union, Local 212, International Ladies' Garment Workers' Union, 329 West Monroe Street, Chicago, Illinois

Frederick F. Umhey, Executive Secretary, International Ladies' Garment Workers' Union, 3 West 16th Street, New York, New York

*For the Employers:*

Abraham Friedensohn, Public Art Embroidery, 29 West 38th Street, New York, New York

Ernest Mosmann, John Mosmann & Sons, Inc., 1217 67th Street, North Bergen, New Jersey

Irvin H. Weiss, Executive Director, Pleaters, Stitchers, and Embroidery Manufacturers' Association of Chicago, 166 West Jackson Boulevard, Chicago, Illinois

Louis Knee, Star Binding and Trimming Corporation, 12 East 22nd Street, New York, New York

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<sup>36</sup> Administrator's Exhibit 1-A.

Section 5(b) of the Act provides that the Industry Committee "shall include a number of disinterested persons representing the public, one of whom the Administrator shall designate as chairman, a like number of persons representing employees in the industry, and a like number representing employers in the industry. In the appointment of the persons representing each group, the Administrator shall give due regard to the geographical regions in which the industry is carried on."<sup>37</sup> In view of the evidence concerning the geographical distribution of the Industry,<sup>38</sup> it is my view that these requirements of the Act were fulfilled in the appointment of this Committee.<sup>39</sup>

### III. Recommendation Made in Accordance with Law

Industry Committee No. 45 determined "that labor costs will not be affected by the establishment of the recommended minimum wage rate to an extent which will substantially curtail employment or cause material dislocation in the industry as now carried on."<sup>40</sup> The Committee also determined "that nothing justified any classification within the industry for the purpose of recommending the highest minimum wage rate possible under the Act which will not result in substantial curtailment of employment in any branch of the industry" and that its recommendation "will not give a competitive advantage to any group in the industry."<sup>41</sup>

The Committee had before it a study prepared by the Economics Branch, Wage and Hour Division, United States Department of Labor, entitled *Some Recent Economic and Legislative Developments Bearing on the Establishment of a Minimum Wage Rate in the Embroideries Industry*, June

<sup>37</sup> Section 5(b) of the Fair Labor Standards Act, c. 676, 52 Stat. 1060; 29 U. S. C., Supp. IV, Sec. 201 *et seq.*

<sup>38</sup> Administrator's Exhibit 2, pp. 30-37; Administrator's Exhibit 4, pp. 11-15.

<sup>39</sup> Cf. *Findings and Opinion of the Administrator in the Matter of the Recommendation of Industry Committee No. 15*, p. 3.

<sup>40</sup> Administrator's Exhibit 1-D, p. 2.

<sup>41</sup> Administrator's Exhibit 1-D, p. 2.

1942.<sup>42</sup> Two reports which were considered by Industry Committee No. 15<sup>43</sup> in making its recommendation for the [fol. 53] 37½-cent minimum hourly wage rate in the Embroideries Industry were also made available to the Committee. These reports were prepared by the Research and Statistics Branch, Wage and Hour Division, and the Bureau of Labor Statistics, United States Department of Labor, and were entitled, respectively, *Report on the Embroideries Industry*, August 1940,<sup>44</sup> and *Earnings and Hours in the Embroidery and Related Products Industry*, March 1940.<sup>45</sup> The Committee also considered data on living costs in different cities and regions and changes in living costs which were made available in the form of two releases prepared by the Bureau of Labor Statistics, United States Department of Labor, entitled *Estimated Intercity Differences in Cost of Living, December 15, 1941*<sup>46</sup> and *Living Costs in Large Cities, March 15, 1942*.<sup>47</sup> The Committee at an informal hearing received additional data offered to it by representatives of employer associations and labor organizations in the Industry.<sup>48</sup>

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<sup>42</sup> Administrator's Exhibit 4.

<sup>43</sup> With the exception of Mr. Irving Epstine, a representative of the employees in the Industry, and Mr. Irvin H. Weiss, a representative of the employers in the Industry, all of the members of Industry Committee No. 45 also served on Industry Committee No. 15.

<sup>44</sup> Administrator's Exhibit 2.

<sup>45</sup> Administrator's Exhibit 3.

<sup>46</sup> Administrator's Exhibit 5.

<sup>47</sup> Administrator's Exhibit 7.

<sup>48</sup> Mr. I. H. Friedman, Executive Secretary, Bias Fabric Manufacturers' Association, New York, New York; Mr. J. Bernard Saltzman, Counsel, Hand Machine Embroiderers Association, Passaic, New Jersey; and Dr. Lazare Teper, Director of Research, International Ladies' Garment Workers' Union, New York, New York. Dr. Teper submitted for the Committee's consideration a memorandum entitled *Forty-Cent Minimum Wage for the Women's Apparel Industry* (International Ladies' Garment Workers' Union Exhibit 1) and two tables entitled, respectively, *Increases in employment, Embroidery Industry, among members of*

Upon the evidence in the record, I find that the Committee considered conditions in the Embroideries Industry, [fol. 54] including the factors required by Section 8 to be considered by it, and that the Committee's recommendation was made in accordance with law.

#### IV. Effect of the Recommended Minimum Hourly Wage of 40 Cents upon Employment in the Industry

Section 8(a) of the Act states the objective of Congress of "reaching, as rapidly as is economically feasible without substantially curtailing employment \* \* \* a universal minimum wage of 40 cents an hour in each industry engaged in commerce or in the production of goods for commerce." I am required by this Section to consider whether the recommended minimum wage rate will, having due regard to economic and competitive conditions, substantially curtail employment in the Industry.<sup>49</sup>

I am required to approve and carry into effect the recommendation of the Committee for a 40-cent minimum hourly wage rate in the Embroideries Industry if I find that it was made in accordance with law, is supported by the evidence adduced at the hearing, and, taking into consideration the same factors as were required to be considered by the Industry Committee, will carry out the purposes of Section 8 of the Act.<sup>50</sup> I have already found that the Committee's recommendation was made in accordance with law. The evidence bearing on the Committee's recommendation which was made a part of the record at the hearing before the Presiding Officer included the documentary material furnished to the Committee and additional material bearing on the Committee's recommendation.<sup>51</sup>

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*Local 66, I. L. G. W. U., between 1940 and 1941 and Embroidery Sales (receipts for contract work) to Dress Manufacturers under contract with the International Ladies' Garment Workers' Union in the New York Metropolitan Area (Administrator's Exhibit 1-C).*

<sup>49</sup> Section 8(a) of the Act.

<sup>50</sup> Section 8(d) of the Act.

<sup>51</sup> Administrator's Exhibits 2, 3, 4, 5, and 7. Two additional releases issued by the Bureau of Labor Statistics, United States Department of Labor, entitled, respectively,

### A. Aggregate Employment in the Industry

#### 1. Effect of the Proposed Minimum on Wage and Operating Costs in Embroidery Establishments

The present minimum hourly wage rate in the Embroideries Industry is 37½ cents, pursuant to a wage order issued by former Administrator Philip B. Fleming upon the recommendation of Industry Committee No. 15.<sup>52</sup> In issuing said wage order, the Administrator found that the recommended minimum wage would not result in substantial curtailment of employment in the Embroideries Industry as a whole nor in any of the branches of the Industry.<sup>53</sup> He found that almost 90 percent of the embroidery establishments are located in the New York City (including northern New Jersey), Chicago, and Philadelphia metropolitan areas, that fixing a minimum wage of 37½ cents an hour would increase labor costs in the three main areas 2.06 percent and in the remaining areas 4.03 percent; that the ratio of labor costs to operating costs was 40 percent in August 1940 for the Embroideries Industry as a whole, 45 percent for pleating, stitching, Bonnaz and hand-embroidery, 65 percent for Swiss hand loom machine products, 40 percent for Schiffl machine products, and 30 percent for bindings, pipings and trimmings; and that the fixing of the recommended minimum would result in an [fol. 56] increase in operating costs of 0.82 percent for the Industry as a whole in the three main areas and 1.61 percent in the remaining areas.<sup>54</sup>

A survey by the Bureau of Labor Statistics, United

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*Estimated Intercity Differences in Cost of Living June 15, 1942, and Change in Cost of Living in Large Cities, July 15, 1942, were included in the record (Administrator's Exhibits 6 and 8).*

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<sup>52</sup> Title 29, c. V, Part 589, Code of Federal Regulations.

<sup>53</sup> *Findings and Opinion of the Administrator in the Matter of the Recommendation of Industry Committee No. 15*, p. 6.

<sup>54</sup> *Findings and Opinion of the Administrator in the Matter of the Recommendation of Industry Committee No. 15*, pp. 4-13; Administrator's Exhibit 2, pp. 86-90.

States Department of Labor,<sup>55</sup> containing basic information on average hourly earnings in the Industry in March 1940 was made a part of the record in the proceeding leading to the establishment of the 37½-cent minimum. This survey may also be used as a basis for estimating the probable direct increase in labor costs and operating costs which may be expected to result from the adoption of a 40-cent minimum at the present time.<sup>56</sup> When the rates obtained by the Bureau of Labor Statistics are adjusted to bring all rates up to at least the present 37½-cent minimum, average hourly earnings are estimated as 61.0 cents in the three main areas, an increase of 1.1 cents over the average for 1940, and 47.4 cents for the other areas, representing an increase of about 1.8 cents. Less than one-third of the employees in the three main areas and about one-half of the wage earners in the other areas would appear, upon this basis, to earn less than 40 cents per hour.<sup>57</sup>

[fol. 57] Upon the assumption that the only increase in wage rates since January 27, 1941 when the wage order establishing a minimum hourly rate of 37½ cents became effective is the increase required to bring workers receiving less than 37½ cents an hour up to the wage order rate, the estimated direct increase in the wage bill resulting from the establishment of a minimum wage rate of 40 cents an hour would be 1.2 percent in the three main areas and 2.6 percent in the other areas.<sup>58</sup> The study of the Economics

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<sup>55</sup> Administrator's Exhibit 3; see also Administrator's Exhibit 4.

<sup>56</sup> Administrator's Exhibit 4, p. 57, Appendix A. For the purpose of this proceeding, the average hourly earnings for the Industry shown in the Bureau's wage survey and report of March 1940 are regarded as having been augmented by the amount necessary to increase all those earning less than 37½ cents an hour to 37½ cents (excluding home workers). It is generally recognized that wage rates in the Embroideries Industry as a whole have increased since 1940. The estimates of the extent to which wage bills may be increased by the establishment of a 40-cent minimum hourly wage rate set forth in Administrator's Exhibit 4 tend, therefore, to overstate the actual effects of such a rate.

<sup>57</sup> Administrator's Exhibit 4, p. 43; table 18, p. 44.

<sup>58</sup> *Id.* at 43; table 19, p. 45; R. 70.

Branch tends to show that increase in labor costs since August 1949 have been accompanied by equal, if not greater, increases in non-labor costs, such as costs of raw materials; upon this basis the estimated increase in operating costs resulting from a 40-cent hourly minimum would be not more than one-half of one percent in the three main areas, while the increase for other areas would be approximately 1.2 percent.<sup>59</sup>

These estimates do not take into account, as has been noted, any general upward movement in wages which has occurred since the present wage order became effective. Wages in the Embroideries Industry, as in other industries, are higher now than they were in 1940.<sup>60</sup> This indicates clearly that the effects of the 40-cent minimum on labor costs and total operating costs will be even smaller than those indicated above. Nor can the increased minimum be expected to affect materially wages now above the minimum. Such wages generally are influenced more significantly by other factors, including the general business situation, the bargaining position of labor, and the attitude of management. Furthermore, it is apparent that since there is no legal compulsion to raise these wages, increases will not be given if they tend to curtail operations. At the [fol. 58] present time, of course, such wages generally are subject to the provisions of the Emergency Stabilization Act<sup>61</sup> and Executive Orders Nos. 9250<sup>62</sup> and 9328.<sup>63</sup>

I conclude that, even assuming that the Industry were unable to absorb the wage increase through operating economies or to pass the increase along, the insignificant rise in operating costs which will result from the recommended minimum will not cause substantial curtailment of employment in the Industry.

Looking now to the different types of embroidery work performed by the Embroideries Industry and utilizing the data and assumptions already referred to, it appears that

<sup>59</sup> *Id.* at 52; table 26, p. 54.

<sup>60</sup> Administrator's Exhibit 4, p. 52; table 26, p. 54.

<sup>61</sup> Emergency Stabilization Act of October 2, 1942, c. 26, 56 Stat. 23; 50 U. S. C., sec. 901.

<sup>62</sup> 7 F. R. 7871.

<sup>63</sup> 8 F. R. 4681.

in Bonnaz embroidery, pleating, stitching and hand embroidery the increase in the wage bill resulting from a 40-cent hourly minimum would be 0.8 percent for the three main areas, and 1.7 percent for all other areas.<sup>64</sup> The increase in operating costs would be less than one-half of one percent in the main areas and less than one percent in the other areas.<sup>65</sup> In Swiss hand-machine products the percentage increase in labor costs resulting from the recommended minimum would be 3.3 percent<sup>66</sup> while the increase in operating costs would be 2.1 percent.<sup>67</sup>

In Schiffli machine products the estimated wage bill increase would be 1.9 percent for the three main areas and [fol. 59] 3.2 percent in the other areas.<sup>68</sup> Operating costs would be increased 0.9 percent in the three main areas and 1.4 percent in the other areas.<sup>69</sup> In the production of bindings, pipings and trimmings the increase in the wage bill would amount to 1.9 percent for the main areas and 3.5 percent in the other areas,<sup>70</sup> the increase in operating costs to 0.8 percent and 1.4 percent, respectively.<sup>71</sup>

The establishment of the present minimum of 37½ cents an hour has not curtailed employment, although greater increases in costs were required by such minima.<sup>72</sup> The evidence in the record with respect to the establishment of a 40-cent minimum in this Industry indicates clearly that it

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<sup>64</sup> Administrator's Exhibit 4, p. 43; table 20, p. 46. There is, of course, considerable overlapping with respect to the different types of embroidery performed by plants in the Industry.

<sup>65</sup> Administrator's Exhibit 4, p. 55.

<sup>66</sup> Administrator's Exhibit 4, p. 43; table 21, p. 47.

<sup>67</sup> *Id.* at 55.

<sup>68</sup> Administrator's Exhibit 4, p. 43. Data covering the Swiss hand-machine and Schiffli branches to reflect completely a picture of the wage structure because members of the shop-owner's family are the only or primary workers in many of these establishments.

<sup>69</sup> Administrator's Exhibit 4, table 26, p. 54.

<sup>70</sup> *Id.* at 43; table 22, p. 48.

<sup>71</sup> *Id.*, table 26, p. 54.

<sup>72</sup> Administrator's Exhibit 2, p. 71; table 30, p. 72.

will not result in any substantial unemployment in the Industry or in any reasonable subdivision thereof.

I conclude, therefore, that approval of the 40-cent minimum hourly wage rate which has been recommended by the Committee will not substantially curtail aggregate employment in embroidery establishments, nor result in substantial curtailment of employment in any group of plants in the Industry.

### *B. Economic and Competitive Factors*

The administrator, in his Findings and Opinion on the recommendation of Industry Committee No. 15, considered in detail the various economic and competitive factors in the Industry which are significant in minimum wage proceedings under the Act. He found that they did not indicate, in the light of the anticipated increased wage cost resulting from the 37½-cents-an-hour minimum, that any substantial curtailment of employment would follow from the establishment of such a minimum.<sup>73</sup> In a great many of its aspects the evidence adduced at the hearing of this proceeding was merely repetitious of that upon which the Administrator based his previous findings. Accordingly, only evidence with respect to changes in economic and competitive factors that have developed since December 1940 needs to be touched upon in this opinion.

In the last two years the production of embroideries has experienced a marked upward swing.<sup>74</sup> Restrictions arising out of orders of the War Production Board such as limitations of pleating, prohibition of the use of nailheads, restricted use of gift braids and dyes and priority regulations applicable to rayon and rayon threads<sup>75</sup> have effected

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<sup>73</sup> *Findings and Opinion of the Administrator in the Matter of the Recommendation of Industry Committee No. 15*, pp. 8-11.

<sup>74</sup> Administrator's Exhibit 4, p. 17; R. 72, 1195, 1236, 1237, 1262.

<sup>75</sup> Administrator's Exhibit 4, pp. 17, 18. The Industry generally has been able to adopt its operations to War Production Board restrictions, although plants which formerly specialized in pleating, tucking, and application of nailheads have been compelled to shift to other types of

some of the items used in the creation of embroidery embellishments. On the other hand, it appears that this Industry has likewise benefited by restrictions on the use of other materials for decorative accessories in that embroidery operations are now being substituted therefor.<sup>76</sup>

While in the past imports from abroad, particularly from the Philippines, China, France, and Japan, competed with [fol. 61] domestic products of the Embroideries Industry, the outbreak of the war has practically eliminated foreign sources of competition.<sup>77</sup>

Since the earlier proceeding leading to the establishment of a minimum wage rate of 37½ cents an hour, prices of raw materials and supplies used in the Industry have been sharply increased.<sup>78</sup> Embroidery establishments, however, have also been obtaining far better prices for their work than formerly. The enactment of the Emergency Price Control Act of 1942<sup>79</sup> and price regulations issued thereunder are intended to stabilize prices of both raw materials and finished goods and services and thus halt any inflationary trends, while preserving a balance between costs and prices.

I find that, having due regard to economic and competitive conditions, the proposed 40-cent minimum hourly wage rate will not substantially curtail employment in the Embroideries Industry or in any definable group of plants in the Industry.

### *C. Dislocation of Employment in the Industry*

The possibilities of dislocation of employment resulting from the effect of the approval of the 37½-cent minimum

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embroidery work, such as crochet beading, hand embroidery, and bullion embroidery. With simplification of styles and designs for women's apparel has come a marked increase in the utilization of these types of embroidery for embellishment purposes.

<sup>76</sup> Administrator's Exhibit 4, p. 17.

<sup>77</sup> Administrator's Exhibit 2, p. 54; Administrator's Exhibit 4, pp. 21-26.

<sup>78</sup> Administrator's Exhibit 4, pp. 18, 19.

<sup>79</sup> Act of January 30, 1942, as amended October 2, 1942, c. 576, 56 Stat. 767; 50 U. S. C., sec. 901.

were considered by former Administrator Fleming in his Finding and Opinion on the recommendation of Industry Committee No. 15.<sup>80</sup> The Administrator found that in this Industry location of plants is not a major factor in establishing wage differentials. The evidence in this proceeding does not indicate that any different conclusion should be reached.<sup>81</sup> The 40-cent minimum will, as a matter of fact, tend to stabilize wages in the Industry and its various branches. Upon the basis of the evidence in the record, I find that the proposed minimum will not cause substantial dislocation of employment in any producing area or in any definable group of plants in the Industry.

#### V. Necessity for Classification Within the Industry

The need for, and the propriety of, classifications in the Embroideries Industry were considered by former Administrator Fleming in his Findings and Opinion on the recommendation of Industry Committee No. 15. He found that there was no basis for any classification within the meaning of Section 8(c) of the Act.<sup>82</sup> Industry Committee No. 45 determined, after due consideration, that nothing justified any classification within the Industry for the purpose of recommending the highest minimum wage rate which would not result in substantial curtailment of employment in any branch of the Industry and would not give a competitive advantage to any group in the Industry.<sup>83</sup> Since I have found that a 40-cent minimum will not cause any substantial curtailment or dislocation of employment in any definable

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<sup>80</sup> *Findings and Opinion of the Administrator in the Matter of the Recommendation of Industry Committee No. 15*, pp. 12-13.

<sup>81</sup> Administrator's Exhibit 4, pp. 49, 52. On the basis of a 40-cent minimum for the entire Industry it was estimated the percentage increase in the wage bill for the New York area would be 1.1 percent; for Philadelphia, 1.6 percent; for Chicago, 2.1 percent; and for the other areas, 2.6 percent. *Id.*, table 19, p. 45.

<sup>82</sup> *Findings and Opinion of the Administrator in the Matter of the Recommendation of Industry Committee No. 15*, pp. 14-16.

<sup>83</sup> Administrator's Exhibit 1-D, p. 2.

group of plants in the Industry, and since this minimum [fol. 63] is the highest that may be fixed under the Act, it would appear to be unnecessary to consider in this proceeding whether any classifications should be made within the Industry. I have, nevertheless, considered the evidence on this matter. I find that the evidence in the record on competitive conditions as affected by transportation, living and production costs, wages established for work of like or comparable character by collective bargaining agreements between employers and employees through representatives of their own choosing, and wages paid for work of like or comparable character by employers who voluntarily maintain minimum wage standards in the Industry does not indicate any basis for making classifications within the Industry within the meaning of Section 8(c) of the Act.<sup>84</sup>

## VI. CONCLUSION

Upon reviewing the evidence in this proceeding and considering the provisions of the Act and the same factors which were required to be considered by the Committee, I conclude that the Committee's recommendation for the Embroideries Industry, as defined in Administrative Order No. 145, is made in accordance with law, is supported by the evidence adduced at the hearing, and will carry out the purposes of Section 8 of the Act. Accordingly, I approve the recommendation.

It is also my view that approval of the 40-cent minimum wage recommendation for this Industry will aid in working toward a stabilization of prices and costs of production and fair and equitable wages.

[fol. 64]

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### INDUSTRIAL HOME WORK IN THE EMBROIDERIES INDUSTRY

Section 8(f) of the Act provides that

Orders issued under this section shall define the industries and classifications therein to which they are to apply, and shall contain such terms and conditions as the Administrator finds necessary to carry out the purposes of such orders, to prevent the circumvention

<sup>84</sup> Administrator's Exhibit 2, p. 105; Administrator's Exhibit 4, pp. 36, 37; Administrator's Exhibits 5-8.

or evasion thereof, and to safeguard the minimum wage rates established therein.

Representations having been made to me concerning the effects of industrial home work on the minimum wage structure of the Embroideries Industry and administrative experience having indicated the existence of a serious problem, I provided in the notice of hearing on the minimum wage recommendation of Industry Committee No. 45 that evidence should be taken on the following question:

In the event an order is issued approving the recommendation, what, if any, prohibition, restriction or regulation of home work in this industry is necessary to carry out the purpose of such order, to prevent the circumvention or evasion thereof, and to safeguard the minimum wage rate established therein.<sup>85</sup>

The hearing in this matter was convened by the Presiding Officer at 10:00 a. m., Monday, November 2, 1942, at the Astor Hotel, New York, New York. Morning and afternoon sessions were held through Saturday, November 7, 1942. The hearing reconvened on Tuesday, November 10, 1942, and morning and afternoon sessions were held through [fol. 65] November 13, 1942. Evening sessions were likewise held on Thursday, November 5, 1942, and Thursday, November 12, 1942. The transcript of the testimony given by witnesses who included officials of Federal and State agencies, representatives of employers' associations and labor organizations and individual employers and home workers occupies 1691 pages. A large amount of documentary material was made a part of the record,<sup>86</sup> includ-

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<sup>85</sup> Administrator's Exhibit 1-F.

<sup>86</sup> Administrator's Exhibits 9-19; Division of Labor Standards Exhibits 1-25; New York Department of Labor Exhibits 5-12; International Ladies' Garment Workers' Union Exhibits 1-12; Samuel S. Allan Exhibits 2 and 3; National Hand Embroiderers Association Exhibits 1 and 2; Pleaters, Stitchers and Embroiderers Association, Inc. Exhibits 1-21. Samples of hand embroidered insignia for Army and Navy officers' uniforms, and an exhibit showing steps followed in the production of epaulets for Navy officers' uniforms by the Vanguard Military Equipment Corporation, New York, New York, were included in the record as Samuel S. Allan Exhibits 1 and 4.

ing a report prepared for this proceeding by the Economics Branch, Wage and Hour Division, United States Department of Labor, entitled *The Current Status of Home Work in the Embroideries Industry, October 1942*.<sup>87</sup>

Basic information concerning industrial home work in the Embroideries Industry and inspection problems arising out of the home work system was supplied by Harry Weiss, Director of the Economics Branch, Wage and Hour Division, United States Department of Labor, and by four of the Division's inspectors having experience in home work inspections in the Industry.<sup>88</sup> Additional material was [fol. 66] furnished by the Bureau of Labor Statistics and the Children's Bureau, United States Department of Labor.<sup>89</sup>

Prohibition of industrial home work in the Industry was urged by representatives of Federal and State agencies,<sup>90</sup>

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<sup>87</sup> Administrator's Exhibit 9. The report contains data on the number of industrial home workers in the Industry, the principal home work areas, the relationship of home work to factory work, home work operations, enforcement experience in administering the Act's provisions with respect to home workers, and other material factors.

<sup>88</sup> Harry Weiss, Director, Economics Branch, Wage and Hour Division, United States Department of Labor (R. 18-37, 488-677); Mrs. Vivian Dahl, Supervising Inspector, Philadelphia Regional Office, Region III (R. 350-369, 441-486); Roland G. Cheesman, Supervising Inspector, Newark Branch Office, Region II (R. 125-145, 678-695); Miss Branson Price, Inspector, New York Regional Office, Region II (R. 697-770); and Miss Anne Lande, Acting Supervising Inspector, New York Regional Office, Region II (R. 1661-1671).

<sup>89</sup> A. F. Hinrichs, Acting Commissioner, Bureau of Labor Statistics, United States Department of Labor, furnished information with respect to employment conditions in the needle trades in the New York metropolitan area (R. 42-67); Miss Beatrice McConnell, Director, Industrial Division, Children's Bureau, United States Department of Labor, supplied material on child labor in home work in the Industry and enforcement of minimum wage standards therein (R. 264-334).

<sup>90</sup> Mrs. Clara M. Beyer, Assistant Director, Division of Labor Standards, United States Department of Labor,

the International Ladies' Garment Workers' Union<sup>91</sup> and the Pleaters, Stitchers and Embroiderers Association, Inc. and Covered Button, Buckle and Belt Association of Philadelphia, Pennsylvania.<sup>92</sup>

Appearing in opposition to the prohibition of home work were the Pleaters, Stitchers and Embroiderers Association, [fol. 67] Inc., New York, New York;<sup>93</sup> National Hand Em-

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Washington, D. C. (R. 147-260); Mrs. Margaret F. Ackroyd, Chief, Division of Women and Children, Rhode Island Department of Labor, Providence, Rhode Island (R. 87-124); and Miss Kate Papert, Director, Division of Women in Industry and Minimum Wage, New York Department of Labor, New York, New York (R. 1476-1550).

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<sup>91</sup> The International Ladies' Garment Workers' Union was represented by its Counsel, Elias Lieberman. See the testimony of Nathan Weinberg, Associate Economist (R. 1578-1659).

<sup>92</sup> These associations were represented by David B. Chera-shore, Counsel, and Joseph Nachmann, President, Pleaters, Stitchers and Embroiderers Association, Inc., of Philadelphia, Pennsylvania (R. 368-441).

<sup>93</sup> Witnesses for the Pleaters, Stitchers and Embroiderers Association, Inc., New York, New York, which was represented at the hearing by Norman Kaliski, Counsel, and Walter Brower, Associate Counsel, included eight representatives of concerns in the Industry that employ home workers in New York City and twelve home workers employed by members of the Association (R. 771-904, 941-1337, 1551-1578).

By stipulation entered into between counsel for the Pleaters, Stitchers and Embroiderers Association, Inc., and the International Ladies' Garment Workers' Union, with the approval of counsel for the Division, it was agreed (R. 1394-1395):

“First, the Pleaters, Stitchers, and Embroiderers Association were prepared to call—and they were ready to testify—at least one homemaker from each of the 70-some-odd members of the Association. There has been testimony as to the members of the Association which employ homeworkers.

broiderers and Novelty Manufacturers Association and Associated Manufacturers of Tubular Pippings and Trimmings, New York, New York;<sup>94</sup> Veil Dotters' Association

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"Secondly it is stipulated between us that if those homeworkers appeared, their testimony on direct would have been substantially the same as the testimony of those homeworkers who have already appeared and that on cross-examination the information elicited from them in answer to questions would likewise be substantially the same as that already elicited from other homeworkers."

It was also stipulated that eight additional representatives of embroidery concerns in New York City would have testified on direct and cross-examination to substantially the same effect as the other home work employers who testified at this hearing (R. 1265-1267).

Counsel for the Association explained that the stipulations were voluntarily entered into by him to conserve time and to reduce the length of the record by eliminating merely cumulative evidence. I find that the Presiding Officer's acceptance of the stipulations was appropriate.

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<sup>94</sup> The National Hand Embroiderers and Novelty Manufacturers Association and the Associated Manufacturers of Tubular Pippings and Trimmings were represented at the hearing by Counsel, Solomon S. Friedman, New York, New York. Testimony of three home workers employed by members of the former association was made a part of the record (R. 1396-1417). Counsel for the two associations and for the International Ladies' Garment Workers' Union agreed that the stipulation covering additional home workers entered into between the union and the Pleaters, Stitches and Embroiderers Association, Inc. (footnote 93, *supra*) would also cover two additional home workers engaged in similar types of home work whom counsel had scheduled to be heard (R. 1435-1437). Mr. Friedman presented a summary of returns compiled by him from a mail questionnaire survey distributed to the members of both associations by Joseph Zahn, Manager of the National Hand Embroiderers and Novelty Manufacturers Association (R. 1304-1313, 1338-1367). The summary showed the average age of the

[fol. 68] of America, Inc., New York, New York;<sup>95</sup> Pleaters, Stitchers and Embroidery Manufacturers Association, Inc., Chicago, Illinois;<sup>96</sup> Fixler Bros., Chicago, Illinois;<sup>97</sup> and seven concerns engaged in bullion embroidery of military and naval insignia devices in New York, New York.<sup>98</sup>

Briefs were filed in opposition to the restriction or prohibition of home work in the Industry on behalf of the Pleaters, Stitchers and Embroiderers Association, Inc., New York, New York; the National Hand Embroiderers and Novelty Manufacturers Association and Associated [fol. 69] Manufacturers of Tubular Pipings and Trimmings, New York, New York; Pleaters, Stitchers and Embroidery Manufacturers Association, Inc., Chicago, Illinois; and Gemsco, Inc., Vanguard Military Equipment Corporation et al. Counsel for all of these associations and concerns except the Chicago association and for the International

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home worker covered, average weekly earnings, marital status, average number of children per home work, other dependents, willingness to work in a factory, and other information.

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<sup>95</sup> The Veil Dotters' Association of America, Inc., New York, New York, was represented by Barnett W. Landau, its Executive Director (R. 905-925, 1672-1684).

<sup>96</sup> The Pleaters, Stitchers and Embroidery Manufacturers Association, Inc., Chicago, Illinois, was represented by its counsel, Irvin H. Weiss, and its President, Martin Somers, Chicago, Illinois.

<sup>97</sup> Fixler Bros., Chicago, Illinois, was represented by its counsel, Joseph L. McCormack, Chicago, Illinois (R. 926-940).

<sup>98</sup> Gemsco, Inc., Marz Company, Hertz Company, Tubell and Company, Hilborn Hamberger and Company, C. Hirsch and Sons, and Vanguard Military Equipment Corporation, New York, New York, concerns engaged in bullion embroidery of military and naval insignia devices were represented by Samuel S. Allan, Counsel, New York, New York, and Seymour Altmark, Associate Counsel, New York, New York (R. 1440-1474).

Ladies' Garment Workers' Union, appeared at the oral argument before me on January 26, 1943.<sup>99</sup>

At the opening of the hearing motions to dismiss the hearing "with respect to the possible prohibition of home work" were submitted to the Presiding Officer by counsel for the Pleaters, Stitchers and Embroiderers Association, Inc., and the National Hand Embroiderers and Novelty Manufacturers Association and Associated Manufacturers of Tubular Pippings and Trimmings, New York City. It was contended that: (1) There is no statutory authorization by which the Administrator may prohibit home work in the Industry; (2) prohibition of home work would violate the constitutional rights of both employers and home workers; and (3) prohibition of home work by the Administrator would involve an unlawful assumption by him of the duties and functions of Congress.<sup>100</sup> The Presiding Officer denied the motions, stating:

The question is a legal one which I do not presume to pass upon. My ruling must be made on the basis of the possibility of conflict here, of opposing legal views being right, and I shall follow the regular procedure of overruling the motion and continuing with the hearing \* \* \* <sup>101</sup>

[fol. 70] At the conclusion of the hearing the motions were renewed upon the same grounds and upon the further allegations that (1) the evidence establishes that the minimum wage to be fixed as a result of this proceeding is not in jeopardy, (2) prohibition of home work is not supported by the evidence, and (3) the evidence satisfactorily establishes that home workers in the Industry make the minimum wage. These motions were also denied by the Presiding Officer.<sup>102</sup>

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<sup>99</sup> The scope of the opposition in the Industry to the restriction or prohibition of home work in terms of the employers who will be affected thereby is considered hereafter in this Opinion.

<sup>100</sup> R. 7-12.

<sup>101</sup> R. 10.

<sup>102</sup> R. 1688-1689. The sufficiency of the evidence adduced at the hearing to support restriction or prohibition of industrial home work in the Embroideries Industry is considered in detail hereafter in this Opinion (*infra*. pp. 64-117).

Samuel S. Allan, Counsel for manufacturers of military and naval insignia devices, also contended (1) that the definition of the Industry excludes military embroiderers and "no evidence whatsoever has been offered by the Government or by the proponents to include such embroiderers in this proceeding"; (2) that military embroiderers are of a class separate and apart from the embroiderers and crochet beaders covered by the definition; and (3) that the Committee's recommendation of a 40-cent minimum wage rate does not confer upon the Administrator any right or power to conduct a hearing with respect to abolishing or prohibiting the employment of home workers in the Industry. It was also contended that the calling of the hearing was arbitrary, unreasonable and capricious.<sup>103</sup> The Presiding Officer also denied these motions upon the basis that he had no authority to dismiss the hearing.<sup>104</sup>

The motions by counsel involve two distinct, although related, questions: (1) my authority under the Act to hold a hearing to determine what terms and conditions with respect to industrial home work, if any, are necessary in [fol. 71] any wage order issued in this proceeding in order to carry out the purpose of such order, to prevent its circumvention or evasion, and to safeguard the minimum wage rates established therein; and (2) in the event that I find that it is necessary to include in the wage order terms and conditions regulating, restricting or prohibiting industrial home work, my authority so to regulate, restrict or prohibit. With respect to the first of these questions, this hearing was called to enable all interested persons to express their views and to submit such evidence as they deemed appropriate upon the issues stated in the notice. The hearing on the Committee's minimum wage recommendation was broadened to include the question of the necessity for terms and conditions regulating, restricting or prohibiting home work, not because there is anything in Section 8(f) which requires me to hold a hearing on the matters which I am required by that section to deter-

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<sup>103</sup> R. 10-12, 1687. Points (1) and (2) of Mr. Allan's contentions are discussed in an earlier section of this Opinion (*ante*, pp. 8-11).

<sup>104</sup> R. 1686, 1688-1689.

mine,<sup>105</sup> but because I determined that an investigation should be made and an opportunity afforded to interested persons in the Industry to express their views, submit relevant evidence and offer such argument on the evidence and the law as would enable me to exercise an informed judgment and to reach a sound and reasonable conclusion on the question. A similar procedure has been followed in the case of six other industries in the apparel and related fields, namely, the Jewelry Manufacturing, Knitted Outerwear, Women's Apparel, Gloves and Mittens, Button and Buckle Manufacturing and Handkerchief Manufactur-[fol. 72] ing Industries.<sup>106</sup> The issue at the hearing was "*what, if any, prohibition, restriction, or regulation of home work in this industry is necessary to carry out the purpose of . . . [any wage order issued in this proceeding] to prevent the circumvention or evasion thereof, and to safeguard the minimum wage rate established therein.*"<sup>107</sup> (Italics supplied.) In making this one of the questions to be determined upon the basis of the evidence adduced at the hearing, the notice was clearly in accordance with the intent of Section 8(f). I conclude that the Presiding Officer's action in overruling the motions to dismiss the hearing with re-

<sup>105</sup> Congress provided in Section 8(d) of the Act that the Administrator shall approve or disapprove an industry committee's recommendation only "after due notice to interested persons, and giving them an opportunity to be heard." No such specific requirement is made in the Act, however, with respect to the Administrator's determination of the terms and conditions necessary to carry out a wage order, to prevent its circumvention or evasion, and safeguard the minimum wage rate or rates established therein.

<sup>106</sup> See the Findings and Opinion of former Administrator Philip B. Fleming on the minimum wage recommendation of Industry Committee No. 26 for, and industrial home work in, the Jewelry Manufacturing Industry, dated October 16, 1941, and my Findings and Opinion on the minimum wage recommendations for, and industrial home work in, the Knitted Outerwear Industry (March 30, 1942), Women's Apparel Industry (July 8, 1942), Gloves and Mittens Industry (August 22, 1942), Button and Buckle Manufacturing Industry (September 19, 1942), and Handkerchief Manufacturing Industry (January 22, 1943).

<sup>107</sup> Administrator's Exhibit 1-F.

spect to the home work question in the Embroideries Industry was proper.<sup>108</sup>

I have also considered the second question raised by the motions to dismiss the hearing, namely, my authority to [fol. 73] regulate, restrict or prohibit industrial home work in the Industry in the event that I find that it is necessary to do so in conformity with Section 8(f) of the Act. The ultimate tribunal for the determination of this question is, of course, the courts. I must, nevertheless, rule upon the objections which are before me that the Administrator does not have authority under Section 8(f) of the Act to prohibit, restrict or regulate home work in the Industry. A careful study was made of the language of Section 8(f), its legislative history and the administrative experience of the Wage and Hour Division with respect to the enforcement of minimum wages for home workers by Administrator Fleming before the first hearing was held and an order prohibiting home work was issued in the Jewelry Manufacturing Industry. I reviewed the legal, economic, and administrative bases of action before determining that it was appropriate to proceed in other industries. It is my considered opinion that the Administrator has the legal authority asserted in this proceeding and, accordingly, I must overrule the objections addressed to the question of my authority.

The Presiding Officer rendered numerous rulings on the admissibility of evidence. It is not necessary to refer to

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<sup>108</sup> Prohibition of home work was strongly urged by a number of agencies and organizations, including the Division of Labor Standards, United States Department of Labor; the Division of Women in Industry and Minimum Wage, New York Department of Labor; the Division of Women and Children, Rhode Island Department of Labor; and the International Ladies' Garment Workers' Union. Other proposals were advanced at the hearing, together with supporting evidence and argument, including a proposal for regulation of home work offered by the President of the Pleaters, Stitchers, and Embroiderers Association, Inc. of New York City (R. 1099; see also transcript, oral argument, p. 101.) All proposals on the question stated in the notice of hearing are before me for consideration in this proceeding, not merely proposals for restriction or prohibition.

every instance of such rulings which occurred in the course of the hearing. As provided in the rules of hearing which were set forth in the notice thereof, the Presiding Officer was not bound to observe the rules of evidence prevailing in courts of law or equity in determining the admissibility of documentary evidence, or the propriety of direct or cross-examination. This is an administrative proceeding in which the hearing is intended to serve as a means of providing a full and fair opportunity to all interested persons of making known their views and of supplying appropriate information and evidence for my consideration in deciding the questions which were its subject matter. The Presiding Officer allowed full scope for the introduction of evidence and cross-examining witnesses. All interested persons had [fol. 74] ample opportunity to present their views and evidence, and to test as closely as possible by cross-examination the views and evidence of all witnesses who testified. Since this was plainly in accord with the purpose of the hearing, namely, to secure all the relevant facts available, I am of the firm conviction that no substantial error can be found in the Presiding Officer's conduct of the hearing.<sup>110</sup> Upon a careful appraisal of the transcript of the hearing and the exhibits made a part of the record, as well as those excluded from the record as shown by the transcript, I conclude that the hearing as conducted by the Presiding Officer furnished a full and fair opportunity to all interested persons to present their views and supporting evidence on the matters at issue in this proceeding, that full opportunity

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<sup>110</sup> Although it was contended at the oral argument that witnesses for the Administrator and the union were evasive in answering questions, it was stated by counsel of one of the associations opposing any restriction or regulation of home work:

"No, I don't think there was anything improper in the manner of conducting the hearing. I tried to make it clear that the Presiding Officer is not bound by the rules of procedure as in the state courts" and "We acknowledge we were allowed a complete hearing, and we were permitted to cross-examine all the witnesses all we wanted to, and we were permitted to call all the witnesses we desired" (transcript, oral argument, pp. 33, 35-36).

for cross-examination of witnesses was afforded, and that due process was observed by the Presiding Officer throughout the hearing.

A number of matters, however, appear to require special comment. Upon objection by counsel for the Pleaters, Stitchers and Embroiderers Association, Inc. of New York City, the National Hand Embroiderers and Novelty Manufacturers Association and Associated Manufacturers of Tubular Pippings and Trimmings, the Pleaters, Stitchers and Embroidery Manufacturers Association of Chicago, Illinois, and manufacturers of military and naval insignia [fol. 75] devices, the Presiding Officer denied an offer of counsel for the Division to incorporate into the record by reference the records of hearings held in similar proceedings for the Knitted Outerwear and Women's Apparel Industries. His denial was based upon the ground that, although this had been done without objection in other similar proceedings, the records in question consisted of the testimony of persons who were not available for cross-examination and were not, therefore, admissible under the rules of the hearing. Exceptions were noted by counsel for the Division, the Pleaters, Stitchers and Embroiderers Association of Philadelphia, Pennsylvania, and the International Ladies' Garment Workers' Union.<sup>111</sup>

The documents in question are the records of official proceedings held at the direction of the Administrator. Minimum wage orders which provided for prohibition of industrial home work in the industries involved, except under certain limited conditions, have been issued as a result thereof.<sup>112</sup> Counsel for the Division stated that the prin-

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<sup>111</sup> R. 37-41. Exceptions were also taken to the Presiding Officer's denial of motion to exclude testimony relating to the Knitted Outerwear, Women's Apparel and other related industries and to the relationship between child labor and minimum wage standards on the ground that such testimony was irrelevant and immaterial. See R. 32-34; 59-61; 66-67; 300-301; 663-666; 675-677; 1591. I have considered these objections to the conduct of the proceeding, and I conclude that the Presiding Officer's action in overruling the objections was proper.

<sup>112</sup> Title 29, c. V, Code of Federal Regulations, Parts 617 and 617.100 and 605 and 605.100.

principal purpose of his motion to include these documents by reference in the record of this proceeding was to indicate to the parties at the hearing that the Administrator might take special cognizance of such records in deciding the questions before him.<sup>113</sup>

[fol. 76] The record shows that the Embroideries Industry, while a separate and distinct industry, is related to various other industries.<sup>114</sup> It services particularly the Women's Apparel, Knitted Outerwear and Handkerchief Manufacturing Industries. It was the view of many of the representatives of State and Federal agencies and others who testified at the hearing that the home work problem in the Embroideries Industry has a direct bearing upon the maintenance of minimum wage standards provided by wage order in the industries which it serves.<sup>115</sup>

The offer, for the purpose indicated was, in my judgment, proper and was calculated to inform all of the interested parties of the special relevance of the records in question in determining what, if any, prohibition, restriction or regulation of home work in the Embroideries Industry is necessary to safeguard the recommended minimum wage rate if and when that rate were put into effect by wage order. I conclude, however, that no substantial interest of any of the parties at the hearing was prejudiced by the Presiding Officer's refusal to include the records of the home work proceedings in the Knitted Outerwear and Women's Apparel Industries in the record of this proceeding. I shall take these records into account to the extent that official notice of their contents is permissible.

Counsel for the embroidery associations and manufacturers opposing the restriction or prohibition of home work moved to strike from the record three reports prepared by

<sup>113</sup> R. 38-39. As to the status of records of proceedings under Section 8 of the Act, see also Section 10(a) of the Act.

<sup>114</sup> Administrator's Exhibit 9, p. 1; Administrator's Exhibit 4, p. 1; Administrator's Exhibit 2, p. 1; Weiss, R. 21-22; Ackroyd, R. 89-90; Dahl, R. 351; Nachmann, R. 409-410; Friedensohn, R. 996; Orloff, R. 1093-1095; Weinberg, R. 33, 1399, 1610; Papert, R. 1478.

<sup>115</sup> Ackroyd, R. 89-90; Beyer, R. 149-171; Dahl, R. 351-352; Cherashore, R. 369; Weinberg, R. 1579; see International Ladies' Garment Workers' Union Exhibit 5, pp. 26-27.

the Economics Branch, Wage and Hour Division, United [fol. 77] States Department of Labor, consisting of data on conditions in the Embroideries Industry and on industrial home work in the Industry. It was contended that two of these exhibits <sup>116</sup> were not primarily concerned with home work <sup>117</sup> and that the third, <sup>118</sup> which admittedly dealt exclusively and the current status of home work in the industry, was "not the best available report that could have been prepared for the purposes of the hearing".<sup>119</sup> These motions were overruled by the Presiding Officer.

The first two reports were offered for the record primarily for such bearing as they had on the appropriateness of the minimum wage recommendation which was also a subject matter of the hearing. To the extent that they disclosed data on conditions in the Industry, their inclusion in the record was clearly appropriate for this purpose.<sup>120</sup> It is also clear that insofar as they contained material bearing on the home work question their inclusion in the record was also appropriate with respect to this question. In the light of the purpose of the hearing, I conclude that the two reports in question were properly included in the record for the purposes indicated.<sup>121</sup>

The objection to the report entitled *The Current Status of Home Work in the Embroideries Industry*, October [fol. 78] 1942,<sup>122</sup> went to its probative force rather than to the propriety of its inclusion in the record of the hearing. All parties present had an ample opportunity to examine, check, amplify or disprove the facts set forth in the report and to adduce additional evidentiary material. They were

<sup>116</sup> Administrator's Exhibits 2 and 4.

<sup>117</sup> R. 676-677.

<sup>118</sup> Administrator's Exhibit 9.

<sup>119</sup> R. 677.

<sup>120</sup> See the testimony of Verl E. Roberts, Acting Chief, Industry Committee Studies Section, Economics Branch (R. 13-15).

<sup>121</sup> It may be noted that the reports in question were used extensively by counsel for the embroidery manufacturers in their cross-examination of Harry Weiss, Director, Economics Branch (R. 499-500, 552-553, 555-556, 576-600, 622, 654-661).

<sup>122</sup> Administrator's Exhibit 9.

also given the opportunity to question at length the Director of the Economics Branch under whose direction the report was prepared.<sup>123</sup> His testimony clearly disclosed that the report contains relevant information on the questions which are before me in this proceeding.<sup>124</sup> In view of the nature of this proceeding, and the circumstances referred to, I conclude that the report was properly admitted into the record by the Presiding Officer.

Counsel for the embroidery associations and manufacturers opposed to the restriction or prohibition of home work objected to inclusion in the record of documentary material offered by the Division of Labor Standards, United States Department of Labor.<sup>125</sup> Consideration of these exhibits, the grounds asserted by counsel, and the reasons advanced by the Presiding Officer for including each of these exhibits in the record clearly indicate that the Presiding Officer's action in overruling the objections was entirely proper.<sup>126</sup> Considering the purpose of this pro-

<sup>123</sup> R. 488-677.

<sup>124</sup> R. 667-674.

<sup>125</sup> Division of Labor Standards Exhibits 1-10, 12-25, inclusive. Division of Labor Standards Exhibit 11, being a copy of the New Jersey Industrial Home Work Law (Laws of 1941, c. 308, July 28, 1941) was admitted without objection.

<sup>126</sup> Division of Labor Standards Exhibits 1, 2, and 3 were originally excluded from the record by the Presiding Officer under rule 7 of the rules of hearing (Administrator's Exhibit 1-F; R. 252, 262). Upon there being made available for perusal by the parties at the hearing the complete transcripts and documents from which the exhibits were excerpted, the Presiding Officer ruled that they might be included in the record as containing background material designed to enable the Administrator to consider the home work problem in the Embroideries Industry in its proper perspective (R. 1388-1393).

Division of Labor Standards Exhibits 4, 5, 9, 14, and 19 were objected to on the grounds that the material contained therein was too remote from the date of the hearing to have any bearing on its subject matter, and that they related to conditions existing prior to enactment of the Fair Labor Standards Act. These exhibits were admitted by

ceeding, I conclude that this material was properly included in the record of this proceeding.

[fol. 79] Over the objection of counsel for the Division and the International Ladies' Garment Workers' Union, the Presiding Officer excluded from the record four exhibits offered by the New York Department of Labor, consisting of Home Work Orders Nos. 1-4 prohibiting industrial home work in the Men's and Boys' Clothing, Men's and Boys' Neckwear, Artificial Flower and Feather, and Glove In-

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the Presiding Officer who remarked that "My view of the matter is that the Administrator would hardly wish to make a determination of this matter without familiarity with the historical background of the question involved, and I think that the exhibit properly belongs in the record" (R. 1370). See R. 1369-1370, 1373-1374, 1377-1378, 1381-1384. An additional ground of objection was raised to Exhibits 6, 7, 8, 15, 16, 17, 18, 20, 21, 22, 23, 24, and 25 that they contained statements of persons who were not available for cross-examination. The Presiding Officer correctly pointed out, however: "Now, my conception is that the usefulness of this article from the Social Service Review which is under review to the Administrator in his determination of this matter would be merely the aid it gives him in properly weighing the factual evidence that is contained in the record from witnesses, and I see no reason for its exclusion" (R. 1372). See R., 1370-1373, 1379-1381, 1384-1388.

With respect to Division of Labor Standards Exhibit 10, objection was made to inclusion in the record of "that portion of the exhibit which does not refer to the statutory legislation but is confined to observations or comments in connection with the statutory legislation referred to in the exhibit upon the grounds that the person who prepared such comments has not been made available for cross-examination" (R. 1374). The Presiding Officer overruled the objection and admitted the exhibit "because of the historical nature of the exhibit referred to" (R. 1374). Objection was made to Division of Labor Standards Exhibit 12 upon the ground that "men's neckwear is not included in the definition of the embroidery industry as contained in the notice of this hearing" and upon the further ground that the authors were not available for cross-examination (R. 1375). The Presiding Officer admitted the exhibit, remarking: "I

[fol. 80] dustries in the State of New York.<sup>127</sup> The documents in question are official orders of the State of New [fol. 81] York of which I may, of course, take official notice. The Presiding Officer's ruling did not, as he stated explicitly, bar the orders from my consideration. In view of this fact, and in view also of the fact that the principal parties who might claim to be prejudiced by the Presiding Officer's ruling were the ones who objected to inclusion of the orders in

would have to be shown \* \* \* there is no common home work problem in the men's neckwear industry and the embroidery industry to support your motion for the exclusion of Exhibit 12 of the Division of Labor Standards from the record \* \* \* (R. 1375). Finally, objection was made to Division of Labor Standards Exhibit 13 that it was too remote and that "The reference therein contained under paragraph 11, Section 5, has not been shown to have had any bearing upon conditions prevailing in the embroidery industry and is, therefore, immaterial and irrelevant" (R. 1376-1377). The Presiding Officer admitted this exhibit, stating: "Although I agree with you respecting your statement as to the comment in paragraph 11, page 5, of this exhibit we are referring to, I also understand that the Administrator would not view that at all as proven evidence and that this is merely of an historical nature \* \* \* (R. 1377).

It may be observed that by far the greatest part of the documentary material submitted by the Division of Labor Standards consisted of portions of official transcripts of hearings conducted by the National Recovery Administration, official orders or reports of Federal and State agencies, and resolutions and reports of the International Association of Governmental Labor Officials and the National Conference on Labor Legislation. Division of Labor Standards Exhibits 6, 15, and 21 consisted of articles in reputable journals by experts in the field of labor and social legislation.

<sup>127</sup> R. 1489-1497. The Presiding Officer stated: "Now, the documents offered as Exhibits Nos. 1 to 4 \* \* \* are not \* \* \* of an historical nature. They are patterns set by the State of New York for the prohibition and regulation of homework, not in the industry under consideration, but 4 other industries. I do not conceive that these

the record, I conclude that his refusal so to include them was not prejudicial to any of the interested persons in this proceeding.

### I. Need for Terms and Conditions on Home Work in the Embroideries Industry

Industrial home work as an economic and social problem is not new, nor is it confined to the Embroideries Industry. The general nature of industrial home work and the difficulties of control which exist in other industries where home workers are employed have been considered in other hearings where the home work question was involved.<sup>128</sup> This proceeding is not concerned with the question whether home work is desirable or undesirable from a social point of view or as a form of economic organization. It is concerned solely with whether the home work system in the Embroideries Industry furnishes a means of circumventing or evading a wage order putting into effect the minimum wage recommendation of Industry Committee No. 45 so

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orders if included in the records are of a nature to influence the Administrator in his primary determination of the question whether homework should be regulated at all or not. I do conceive that if his determination on the basis of the other evidence in the record would be that homework ought to be regulated, then these orders might serve as a pattern to him for stating how, in what way, it should be regulated. The argument in support of the objection to the inclusion of these in the record . . . that they are of a prejudicial nature has some weight with me. In view of the fact that these orders will be available to the Administrator after he has reached a determination to regulate homework or to prohibit homework, if he should reach such a decision,—I am going to rule that they may not be accepted for the record" (R. 1496).

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<sup>128</sup> See Findings and Opinions of the Administrator in the matter of minimum wage recommendations for, and industrial home work in, the Jewelry Manufacturing Industry, Women's Apparel Industry, Knitted Outerwear Industry, Gloves and Mittens Industry, Button and Buckle Manufacturing Industry, and Handkerchief Manufacturing Industry.

that it is necessary to provide in the wage order for its regulation, restriction or prohibition in order to carry out the purposes of such order and to safeguard the minimum wage rate established therein.

[fol. 82] A. Home Work in the Embroideries Industry

The Embroideries Industry produces primarily for manufacturers of apparel and apparel accessories. It also serves producers of other articles such as shoes, handbags, art linen, draperies and curtains, lamp shades, upholstery and similar articles.<sup>129</sup>

The Industry may be regarded, for descriptive purposes, as falling into four major types of embroidery products or processes: (1) Schiffli machine products, (2) Swiss hand-machine embroidery, (3) Bonnaz, stitching, pleating, crochet beading, tucking, piping, passementerie and hand embroideries, and other forms of embroidery, and (4) trimmings, bindings and stamped art goods.<sup>130</sup> This division is based upon the major types of embroidery performed in the Industry. It does not, however, represent any clear cut grouping of embroidery establishments. Such a grouping of plants is not possible. Many plants are engaged in a large number of different types of embroidery within a particular branch or among different branches.<sup>131</sup>

<sup>129</sup> Administrator's Exhibit 4, pp. 1 and 2; Administrator's Exhibit 2, pp. 1 and 2. The allocation of processes and products is based upon opinions of representative employers and spokesmen of trade associations and labor unions as given to field investigators of the Wage and Hour Division (Administrator's Exhibit 2, p. 2).

<sup>130</sup> For purposes of brevity these four divisions will be referred to as (1) the Schiffli branch, (2) the Swiss branch, (3) the Bonnaz and hand embroideries branch, and (4) the trimmings and art goods branch.

<sup>131</sup> Some of the branches produce the same products, such as emblems. Administrator's Exhibit 2, p. 2. The Census of Manufacturers for 1939 grouped the plants in the Industry according to their principal products into the classifications "Schiffli machine products"; "Embroideries—other than Schiffli"; and "Trimmings (not made in textile mills), stamped art goods, and art needlework." The Industry through its trade associations recognizes Bonnaz and hand

[fol. 83] Power-driven Schiffli machines are used to produce imitations of hand embroidery on yard goods and, to a lesser extent, on "frame" goods such as handkerchiefs, ladies' neckwear, and women's underwear.<sup>132</sup> Home work is not employed in such production to any appreciable extent.<sup>133</sup> Home work operations include machine mending of imperfections and hand cutting of designs, bands, edges, and threads.<sup>134</sup>

Manually operated Swiss hand-loom machines are used to produce a reproduction of hand embroidery. This type of embroidery competes with hand embroidery on handkerchiefs, art linens, children's apparel and similar articles.<sup>135</sup> Concerns using Swiss hand-loom machines also employ only a few home workers.<sup>136</sup> Most of the establishments are "family shops" in which the owner and members of his family do the greater part of the work.<sup>137</sup>

Bonnaz and hand embroidery are commonly performed in the same plants. Some types of work included in this group of embroidery processes are strictly machine processes and are performed almost exclusively by factory workers, as for example, Bonnaz (a machine-made imitation of hand embroidery), pleating and machine drawing. [fol. 84] On the other hand, some embroidery may be performed either by machine or hand and is done by both plant workers and home workers. Operations in this category

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embroideries, crochet beading, stitching, tucking, pleating, piping, passementerie, and allied forms of embellishment as one division of the Industry. Swiss hand-machine embroidery and stamped art goods represent types of embroidery different from such operations. Administrator's Exhibit 4, p. 4. See also Friedensohn, R. 992, 1060-1063, 1086; Meyerson, R. 1221-1223; Geller, R. 1235; Alpine, R. 1248-1250; Ganz, R. 1268; Sprung, R. 1458, 1461-1463.

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<sup>132</sup> Administrator's Exhibit 2, pp. 41, 42.

<sup>133</sup> Administrator's Exhibit 4, p. 30.

<sup>134</sup> Administrator's Exhibit 9, p. 13.

<sup>135</sup> Administrator's Exhibit 2, p. 41.

<sup>136</sup> Administrator's Exhibit 9, p. 13.

<sup>137</sup> Administrator's Exhibit 4, pp. 4, 9. This applies equally to the Schiffli embroidery.

include ornamental stitching, tucking, shirring, smocking, hemstitching, fagoting, appliqueing, eyeleting, thread, splitting, embroidery thread cutting, scallop cutting, lace cutting, straight-cutting of embroidery, emblems, nailheads, and rhinestone setting.<sup>138</sup> Additional strictly hand operations, such as hand embroidery, hand rolling, crochet beading, rhinestone trimming, sequin and spangle trimming, passementerie, lace making up, making up of embroidery yard goods, cutting out of embroidery and veil dotting, are performed to some extent by factory workers but principally by home workers.<sup>139</sup>

Plants which manufacture trimmings and bindings produce some products similar to those of the Bonnaz and hand embroidery branch such as fagoting, bindings, piping and passementerie. These operations involve both machine and hand work and are performed by both plant workers and home workers. In the production of stamped art goods, textile fabric and articles are stamped with designs to be worked later by the purchaser of such items. Home workers are employed to make "models" which are used for display purposes.<sup>140</sup>

The great bulk of home work in the Embroideries Industry is concentrated in the State of New York. The [fol. 85] States of New Jersey, Pennsylvania, and Illinois rank next in importance in the order named.<sup>141</sup> Home work in embroideries is also found in Massachusetts, Missouri, Maryland, California, and Ohio, as well as in other States.<sup>142</sup>

<sup>138</sup> Administrator's Exhibit 2, pp. 5-6.

<sup>139</sup> Administrator's Exhibit 2, pp. 4-5; Administrator's Exhibit 9, p. 13. The data contained in the reports of the Economics Branch were supported by the testimony of employers who appeared on behalf of the associations and concerns opposed to the restriction or prohibition of home work.

<sup>140</sup> Administrator's Exhibit 4, pp. 30, 31; McCormack, R. 82, 926-930.

<sup>141</sup> Administrator's Exhibit 4, p. 31; tables 13 and 14, pp. 34 and 35; Administrator's Exhibit 9, tables 8 and 9, pp. 14, 15; Beyer, R. 177; Dahl, R. 352; McCormack, R. 927; Sprung, R. 1441.

<sup>142</sup> Administrator's Exhibit 9, table 3, p. 6; Appendix table 1, pp. 46-47.

The nature of home work is such that estimating the number of home workers employed in the Embroideries Industry is difficult.<sup>143</sup> Data submitted by the Economics Branch contained estimates for the number of home workers employed at peak employment in this Industry between April 1, 1939 and July 15, 1942 ranging from roughly 8,500 to 12,000.<sup>144</sup> Approximately 71 percent were employed by New York firms,<sup>145</sup> about 17 percent by New Jersey firms. Pennsylvania and Illinois establishments accounted for practically all of the remaining home workers.<sup>146</sup> Employment figures for factory workers may, by contrast, be ascertained with relative ease and definiteness. The estimated [fol. 86] number of factory wage earners as of June 1942 was 18,500.<sup>147</sup>

Data based upon the Census of Manufactures which were submitted by the Economics Branch showed that the average number of wage earners per factory in 1,431 establishments employing 17,828 factory workers was between 12 and 13 in 1939. Three percent of all establishments in the Industry averaged more than 50 wage earners per plant. Two-fifths of the establishments employed five or less.

<sup>143</sup> Administrator's Exhibit 4, p. 30; Administrator's Exhibit 9, p. 2; Weiss, R. 22, 23.

<sup>144</sup> Administrator's Exhibit 9, p. 2; Weiss, R. 23, 24.

<sup>145</sup> According to records of the New York Department of Labor, 327 establishments in the Embroideries Industry in the State were permitted, as of October 21, 1942, to distribute home work and 4,561 home workers held certificates; Papert, R. 1478. Joseph L. McCormack estimated that approximately 500 home workers were employed in the Chicago area in making "models" of art needlework (R. 927).

<sup>146</sup> Administrator's Exhibit 9, p. 2.

<sup>147</sup> Administrator's Exhibit 4, p. 11; table 1, p. 5. Schiffl embroidery accounted for about 4,000 factory workers in June 1942, Swiss hand-machine embroidery for 1,500, Bonnaz and hand embroidery for 10,000, bindings, trimmings and pipings for 2,500, and stamped art goods for 400 or 500. The Census of Manufacturers for 1939 estimated that of the 17,828 factory employees in the Industry 3,750 were in Schiffl shops, 4,797 in "embroidery other than Schiffl," and 9,281 in "Trimmings and stamped art goods."

About 84 percent employed an average of 20 or less per establishment.<sup>148</sup> Data submitted to the Wage and Hour Division by employers acknowledging receipt of home work handbooks during the period from April 1, 1939 to the end of the first six and one-half months of 1942 indicate that embroidery establishments in New York, which employs some 71 percent of all the home workers in the Industry, employed home workers per plant numbering twice the number of factory wage earners per plant in the Industry as a whole.<sup>149</sup> In New York 217 firms had an average of 26 [fol. 87] home workers per firm. On the other hand, 96 New Jersey firms employed only approximately 14 home workers per firm, due probably to the New Jersey Industrial Home Work Law, which, effective July 28, 1941, restricted the number of home workers per plant to one-third of the number of factory workers per establishment.<sup>150</sup> In Pennsylvania, 14 firms had an average of about 9 home workers each.<sup>151</sup>

Home work in the Embroideries Industry is distributed directly to home workers by regular embroidery manufacturers and contractors who own inside shops or indirectly

<sup>148</sup> Administrator's Exhibit 4, p. 9; table 4, p. 10.

<sup>149</sup> Administrator's Exhibit 9, table 2, p. 4. Not all firms which receive handbooks return acknowledgment forms. On the other hand, not every firm needs to apply for handbooks every year. The data indicate, however, that the average number of home workers per firm has not varied greatly from one year to another. On the basis of home work certificates issued by the State of New York as of October 21, 1942, it appears that the overall ratio of home workers to factory workers in the Embroideries Industry in that State was 4 to 10 (Papert, R. 1478, 1507). J. Alpine, an employer who appeared on behalf of the Pleaters, Stitchers and Embroiderers Association, Inc., of New York City, testified that his firm, the Worth Pleating and Stitching Co. of New York City, performed all types of machine and handmade embroidery. During the height of the season it usually employed 40 inside machine workers and 60 home workers on hand embroidery (R. 1249).

<sup>150</sup> Laws of New Jersey, 1941, c. 308; Division of Labor Standards Exhibit 11.

<sup>151</sup> Administrator's Exhibit 9, table 2, p. 4.

by contract shops or distributors who do not have inside shops.<sup>152</sup> Thus, it is apparent that in many cases the material upon which the home worker performs operations passes through several hands before reaching the home worker.<sup>153</sup>

The contention has been advanced by the New York embroidery employers' associations which appeared in opposition to the restriction of prohibition of home work in the Embroideries Industry that the greatest difficulties in the Industry from the point of view of enforcing the Act's minimum wage provisions arise when the home workers are em-

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<sup>152</sup> See Administrator's Exhibit 4, p. 6; Administrator's Exhibit 9, p. 11; Weiss, R. 24, 25. Since by far the greatest part of work in the Embroideries Industry consists of the embellishment of materials, garments or articles of various types produced by garment and other similar manufacturers, contract factories as defined by the Census, predominate in this Industry. Contract shops work on materials and products supplied by manufacturers and jobbers and usually supply only threads or other materials such as beads, sequins, nailheads and the like. Some establishments, especially those engaged in Bonnaz and hand embroidery, also create original designs. Manufacturers who own the raw materials and sell the finished products are designated as regular establishments by the Census. Even though they do not own the basic materials, some contractors consider themselves manufacturers because they contribute original designs and supply secondary materials of substantial value, such as beads, sequins and nailheads, in addition to threads. See Weiss, R. 24, 25.

Distributors generally perform no functions other than receiving work from a particular manufacturer or contractor and distributing this work to home workers directly employed by such distributors. Administrator's Exhibit 9, p. 11; Weiss, R. 25.

<sup>153</sup> Administrator's Exhibit 9, p. 11; see also the testimony of witnesses called by the associations and concerns opposed to the restriction or prohibition of home work; Alpine, R. 1250; McCormack, R. 931; Landau, R. 922-924; Friendensohn, R. 1025, 1026.

ployed by a contractor or a distributor and that statutes enacted by the States of New York and New Jersey have virtually eliminated this problem.<sup>154</sup> These claims are

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<sup>154</sup> See the briefs submitted on behalf of the Pleaters, Stitchers and Embroiderers Association, Inc. (pp. 9-11); National Hand Embroiderers and Novelty Manufacturers Association and Associated Manufacturers of Tubular Pippings and Trimmings, Inc. (pp. 14-15); and Manufacturers of Military and Naval Insignia (p. 31).

The New York Act (New York State Department of Labor Exhibit 12) enacted in May 1942 provides as follows:

“Homework contractor or distributor” means any person who for the account or benefit of an employer delivers to a homemaker or any other person not engaged by such employer articles or materials to be manufactured in a home and thereafter to be returned to said person or otherwise disposed of in accordance with his direction. (Sec. 350 sub. 2-h, Labor Law—Amendment)

. . . . .

Distribution of homework to employees by employer. The employer shall, wherever homework is permitted, distribute directly to his homeworkers, all material and articles of homework. No employer shall give out any material or articles for homework through any homework contractors or distributors. No homework contractors or distributors shall receive or distribute any materials or articles for or as a result of industrial homework.

This prohibition shall be deemed absolute; anything in this article to the contrary notwithstanding, and shall not be subject to the powers of the industrial commissioner under section three hundred fifty-one. (Sec. 453-a, Labor Law—Amendment)

. . . . .

Employment status of industrial homeworkers. All industrial homeworkers shall be presumed to be employees of their employer and not independent contractors. (Sec. 361-a, Labor Law—Amendment)

[fol. 89] based more on argument than on evidence. Miss Kate Papert, Director, Division of Women in Industry and Minimum Wage, New York Department of Labor, testified that a survey made by the Department in 1941 and 1942 showed that the number of home workers employed by contractors and distributors constituted a minority of the total number of home workers in New York.<sup>155</sup> The statutes in [fol. 90] question do not eliminate the distributor problem insofar as it may exist in States other than New York and New Jersey, nor do they prevent manufacturers in New York and New Jersey from sending work to distributors in other States where no ban on the distributor exists.

With respect to home work contractors and distributors

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The New Jersey Industrial Home Work Law, Laws of 1941, c. 308, July 28, 1941 (Division of Labor Standards Exhibit 11), provides in part as follows:

(b) Industrial home work shall be performed under subsection (a) of this section only where:

(1) the employer maintains a factory or business in this State in which persons are employed on operations which are the same or similar to the home work operations permitted and, provided further, that the commissioner shall determine the ratio, which shall not exceed one-third, of the number of home workers engaged by an employer to the number of persons employed by said employer in his factory or business, said determination to be based on conditions of employment, maintenance of existing labor standards and other factors involving the preservation of the best interests of this State;

(2) on any operation, a home worker is paid at least the same rate as that paid to workers on the same or similar operations in the factory or business; and

(3) the employer and home worker comply with such other terms or conditions as the commissioner may by rule or regulation prescribe to safeguard the health and welfare of home workers and the wages and working conditions of factory workers, and to effectuate the purpose of this section.

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<sup>155</sup> R. 1501-1503, 1525, 1526.

in New York and New Jersey it is clear from the evidence in the record that while important sources of disregard for and evasion of minimum wages and other standards have at least in part been eliminated by the legislation in these States, violations of the minimum wage, overtime, child labor and record-keeping provisions of the Act are by no means limited to contractors and distributors.<sup>156</sup> Furthermore, the New Jersey statute does not prohibit the contractor or even the distributor as such. It requires him to maintain "a factory or business . . . in which persons are employed on operations which are the same or similar to the home work operations permitted" and limits the number of homeworkers per establishment to not more than one-third the number of persons employed in the factory or business. While the New Jersey statute has undoubtedly had a beneficial effect upon the compliance record of the Industry, the nature of home work is such as to make it very difficult for the Wage and Hour Division to secure the minimum wages required under the Act for home workers.<sup>157</sup> The New York statute prohibits any employer from giving [fol. 91] out any material or articles for home work through home work contractors or distributors, but the effect of this prohibition is limited by the definition of "contractors and distributors" contained in the statute.<sup>158</sup> Miss Kate Papert, Director of the Division of Women in Industry and Minimum Wage, New York Department of Labor, stated that in interpreting the statute:

. . . we rely largely on the language of the thing itself and as distinguished from employer a contractor

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<sup>156</sup> Administrator's Exhibit 9, table 22, p. 44. Of 147 firms found by the Wage and Hour Division upon inspection to be in violation of the minimum wage provisions of the Act during the period from October 24, 1938 to July 1, 1942, 63 were manufacturers and 84 were contractors.

<sup>157</sup> Cheesman, R. 135-136. Mr. Cheesman, Supervising Inspector, Newark Branch Office, Region II, Wage and Hour Division, testified that the New Jersey statute has not abolished the embroidery contractors who dominate, as contrasted with embroidery manufacturers, in that State, although it has limited their former freedom of organization and operation to a considerable extent (R. 139).

<sup>158</sup> New York Department of Labor Exhibit 12.

is a person who has from a practical standpoint no financial interest in the article other than the profit he will get from the distribution, from the wages of the homeworkers. In other words, an employer, in reverse, is someone who has a financial stake, has a place of business, owns the material, and the contractor merely distributes to the workers and gets a rake off from that distribution.<sup>159</sup>

She stated further that—

The fact that . . . [the contractor] has a shop wouldn't necessarily make him an employer. It depends upon all the other factors in the situation [A] person who is responsible for the design, who owns the materials. . . . He is regarded as a manufacturer. . . . For instance, the man who did embroidery, chochet beading, for example, owned the beads, made the pattern, and did all the work on it, and sold it as a piece of work he was doing for a dress manufacturer, he is an embroidery manufacturer. . . . But may I make clear that the facts often have to be determined [fol. 92] on an individual basis, since there are variations?<sup>160</sup>

Miss Papert confirmed the explanation contained in the report of the Economics Branch, Wage and Hour Division, on the status of home work in the Industry, that—

. . . All home work must now be distributed directly to the home workers by the owner of the material. The New York State Department of Labor has held, however, that embroidery firms, although in fact contractors because they do not own the fabric or articles processed, are manufacturers when they add something of substantive value, as for example, designs and materials of value. Distributors, as well as contractors who add only labor, or only thread and labor, must cease operations.<sup>161</sup>

<sup>159</sup> R. 1539.

<sup>160</sup> R. 1539-1540.

<sup>161</sup> Administrator's Exhibit 9, p. 24; R. 1540.

Barnett W. Landau, Executive Director of the Vail Doters' Association of America, Inc., New York, testified:

The members of my association \* \* \* are basically contractors or distributors, and they are permitted to continue this operation of distributing homework at this time in spite of the existence of the New York State law prohibiting it, because of an official decision handed down by the legal division of the State of New York, giving us the status of employers rather than distributors.<sup>162</sup>

[fol. 93] Similarly, in the case of crochet beading, embroidery concerns often supply beads and other materials, and quite commonly the designs.<sup>163</sup> In the embroidery of military and naval insignia devices for officers also the embroiderer supplies the cloth, bullion thread and other materials. This work is performed in compliance with Army and Navy specifications.<sup>164</sup>

It is apparent from the evidence in the record that, although the distributor who maintains no shop and who performs no function except to distribute work to home workers either for a manufacturer or a contractor who has been eliminated by statute in New Jersey and New York, the contract system itself has by no means been eliminated. It appears likely that a considerable number of former distributors have established shops of their own in the vicinity of their home workers, where they continue to operate within the confines of the New York and New Jersey laws.<sup>165</sup> Others, of course, have probably become employees of

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<sup>162</sup> R. 921. Veiling is given out by jobber manufacturers to veil dotting concerns which employ plant workers to cut it into different patterns or sizes and which then distribute the cut material, together with additional material such as chenille, to home workers "and the actual processing of veil dotting is done by the home workers in their homes, placing the strips or bits of chenille onto the veil either in pattern form or in straight form and twisted to simulate a dot, some being small, others being large" (R. 923-924).

<sup>163</sup> Administrator's Exhibits 2, p. 44; 4, p. 6; and 9, p. 11.

<sup>164</sup> Sprung, R. 1441, 1452-1454; Samuel S. Allan Exhibit 2.

<sup>165</sup> Administrator's Exhibit 9, p. 24.

manufacturers and their former home workers are carried on the pay rolls of the manufacturers.<sup>166</sup> However that may be, it is clear that violations of the minimum wage provisions of the Act are not limited to distributors, and that manufacturers and contractors in the Industry who qualify as legal distributors of home work under the New Jersey and New York laws are also found in a great many cases to be in violation of those provisions.<sup>167</sup>

[fol. 94] Nathan Weinberg, Associate Research Director, International Ladies' Garment Workers' Union, testified:

The position has been taken that the contract system is the root of most of the evils connected with home work. In our experience with the home work system we have found that the main difficulty with the contract system is that it permits evasion of responsibility. The distributor passes the buck to the contractor, who in turn blames the manufacturer. But we have found very often that the manufacturer is the one basically at fault, because he doesn't pay the contractor or distributor high enough sums to permit the payment of the minimum wage to the home worker. This evil is not eliminated in the embroidery industry by the New York law prohibiting the continuance of contractors and distributors as defined in that law, because as the embroidery so-called manufacturer functions, he is in essence a contractor. What he can pay for embroidery work depends on what he is paid by manufacturers of dresses, by manufacturers of children's wear, of knitted outerwear or underwear or whatever the particular garment might be. So that there still remains the question of fixing the major responsibility. And in periods where embroidery is not

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<sup>166</sup> *Ibid.*

<sup>167</sup> Administrator's Exhibit 9, tables 21 and 22, pp. 43 and 44. Ackroyd, R. 99; Cheesman, R. 130, 131; Dahl, R. 352; Price, R. 737, 747-749; Weiss, R. 633, 634. Miss Papert testified that violations charged to distributors were in a majority of cases the result of manufacturers not paying the contractors a sufficient amount for the work to assure the payment of minimum wages to the home workers (R. 1534).

in vogue, competition among embroidery manufacturers becomes extremely severe, and in an attempt to get work from dress and other apparel manufacturers, they tend to underbid each other in order to get whatever work is available. This underbidding often reaches the point where they do not get enough from the dress manufacturers to permit the payment of the minimum wage to their home workers. So that the New York law abolishing the contractor and distributor does not at all solve the situations in so far as the embroiderer is to a great extent a contractor. I might [fol. 95] note, incidentally, that the Census of Manufactures classifies the greatest number of embroidery establishments as contract establishments for the reason that they do not work on materials owned by themselves but on materials furnished them by apparel manufacturers for purposes of having those materials embroidered.<sup>168</sup>

I conclude, upon the evidence in the record, that while the New York and New Jersey laws prohibiting distributors who operate no shops<sup>169</sup> from distributing work to home workers and restricting contractors may have a beneficial effect through the elimination of a wholly irresponsible group of operators in the Industry, they have not changed the economic structure of the Industry as presently carried on.<sup>170</sup> Furthermore, even if the distributors were elimi-

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<sup>168</sup> R. 1599. See also Administrator's Exhibit 9, p. 11; table 7, p. 12.

<sup>169</sup> The New York law also requires that something of substantive value be added by the contractor before he can qualify as an "employer" (New York Department of Labor Exhibit 12).

<sup>170</sup> It was testified by inspectors of the Wage and Hour Division that the New Jersey law had led to an increase in illegal distribution of home work in New Jersey by manufacturers from outside the State and to some extent by manufacturers within the State. Similarly, it was stated that work has been sent to New Jersey to evade the New York law. Cheesman, R. 681, 690; Dahl, R. 351, 352. This evidence was corroborated by Miss Papert for the New

nated the fundamental difficulties of regulating minimum wages for home workers in this Industry would not be resolved.<sup>171</sup>

[fol. 96] B. *Labor Conditions in Industrial Home Work in the Embroideries Industry*

The report of the Economics Branch, Wage and Hour Division, entitled *The Current Status of Home Work in the Embroideries Industry*, October 1942 makes clear that one of the most important factors affecting the earnings and working conditions of home workers in the Embroideries Industry is the great multiplicity of designs and styles.

The embroideries industry, by its very nature, is very largely dependent upon novel and original designs which producers in the industry continuously strive to create. Variations in designs are constantly being made, since fashions are often short-lived. As these adjustments take place, piece rates must be determined and applied with practically every change in the designs. These changes in the piece rates affect both plant workers and home workers.

Because of the multiplicity of designs and styles, few operations in the embroideries industry lend themselves to standardization; this is especially true of home work operations. In addition to hundreds of varieties of designs there is a multiplicity of types of stitches and materials. Even in lace-cutting, which requires no sewing operations but merely the use of scissors for the cutting of laces and embroideries, the same piece of lace may be cut into numerous patterns. For example, one lace-cutting employer, who received work from 40 manufacturers or contractors, distributed different patterns to his home workers almost daily. During a period of six months, another lace-cutting firm received work requiring the cutting of 300 different designs, each of which had a different piece rate.

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York Department of Labor and by employers who appeared both in support of and in opposition to the restriction or prohibition of home work in the Industry. See Papert, R. 1534-1535; Nachman, R. 372; Orloff, R. 1167.

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<sup>171</sup> See *infra*, pp. 90-95.

[fol. 97] Piece rates for plant workers can readily be checked. In fact, the setting of piece rates to yield predetermined average hourly rates in union shops is carried on by negotiations between the employer and a price committee. In non-union shops, certain workers are timed on each style; after rates have been set, they frequently are modified.

The setting of piece rates to yield the minimum wage for home workers is a much more complex problem than for plant workers. Where the operation is performed in the plant, inspection reports indicate that in the majority of cases the same piece rate is applied to home work though no allowance is made for variations in working conditions or in the organization of the work. Nor is allowance made for the wide range in the productivity of home workers; the employer has little knowledge of the actual productivity of his home workers since he cannot actually measure their working hours.

Other indirect factors also influence the earnings of home workers, such as delivery costs, waiting time, and certain costs of equipment. Some of these costs are not very large. Crochet beaders must provide frames, costing about \$2, for their work, as well as crochet needles, but these usually represent initial investments with little replacement. Lace and embroidery cutters must furnish their own shears and pay for sharpening them. On the other hand, the menders of embroidery in the Schiffli and hand-machine embroidery branches usually provide their own sewing machines, which represent investments up to about \$200. No evidence was found in inspection records of reimbursements by the employers for these expenditures.<sup>172</sup>

[fol. 98] The methods used by embroiderers for setting piece rates for home work operations result in an artificial standard of payment. Piece rates for operations which are performed in the home as well as in the factory are normally the same, whether performed in the home or in the factory, without regard to differences in working conditions.

The most common practice followed in the setting of

<sup>172</sup> Administrator's Exhibit 9, p. 28.

piece rates for crochet beading, hand embroidery and operations done predominantly in the home appears to be the timing of a sample maker in the factory performing a particular piece of work and applying the rate thus obtained to the home work operation. Of the firms inspected by the Wage and Hour Division during the period from June 1, 1939 to July 1, 1942, a review of 211 showed that 80, or 37.9 percent, fixed piece rates for home workers upon the basis of arbitrary estimates; 73, or 34.6 percent, based the rates for home workers on time tests of plant sample makers; and only 40, or 19 percent, based the piece rates for home workers on time tests of some of the home workers themselves.<sup>173</sup>

The practice of paying home workers upon the basis of artificial rates established by timing a sample maker was corroborated by virtually all of the home workers and home work employers who testified at the hearing. Mrs. Florence Acerbo, a witness for the Pleaters, Stitchers and Embroiderers' Association, Inc., which opposed restriction or prohibition of home work, testified on cross-examination that she did not keep a record of the time consumed on each lot [fol. 99] of work distributed to her, "because as I said before they know already how much, how long a piece takes and some women is naturally faster than others, and maybe in the piece rates it is 2 hours; some could take an hour and a half, or some an hour and three quarters or some just take two hours."<sup>174</sup>

Mrs. Acerbo testified further that the employer takes it for granted that the home worker does not require any longer time to finish the work than the sample makers.<sup>175</sup>

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<sup>173</sup> Administrator's Exhibit 9, table 14, p. 30. Methods of fixing piece rates for home workers were not reported for 18, or 8.5 percent, of the 211 firms. Eleven additional firms reported that their home workers were paid on an hourly basis. These firms were engaged in mending Schiffli and hand-machine embroideries. This is one of the few home work operations performed on machines and is the only work in the Industry for which it is customary to pay hourly rates.

<sup>174</sup> R. 949-950.

<sup>175</sup> R. 950.

Mrs. Jean Pelino, another witness for the same association, testified that the home worker is informed of the price that will be paid, based upon the time required by the sample maker "who is a very experienced worker," and that her pay as a home worker was not based upon the number of hours consumed but upon the piece rates fixed by the employer. She also testified that she occasionally received special work that had to be completed within a given time, and that she might have to work as long as 12 straight hours in order to complete her work within the required time.<sup>176</sup>

Mrs. Angelino Fugero, who also testified for the Pleaters, Stitchers and Embroiderers' Association, Inc., admitted that the time entered in her home work handbook was not the actual number of hours it had taken her to complete the various lots of work shown, but was the time fixed for the work upon the basis of time tests of five or six girls performing the same work in the factory. Once the rate was set by this method, she stated, it was never changed whether or not the work actually took the home worker more or less time than the fixed standard.<sup>177</sup>

[fol. 100] Mrs. Florence White, a witness for the National Hand Embroiderers and Novelty Manufacturers Association, testified that at times she worked as a sample maker and that upon the basis of the time she required to complete the various lots of work assigned to her piece rates were set for other home workers.<sup>178</sup>

Among the employers of home workers who appeared on behalf of the Pleaters, Stitchers, and Embroiderers' Association, Inc., of New York City, Abraham Friedensohn, Public Art Embroidery Company, Inc., admitted that the piece rates fixed for crochet beading were commonly based upon the time required by a sample maker to do the work. He further stated that the home worker was not ordinarily in a position to report the actual hours worked because she was working at home on her own time, that "She works when she wants to and she does her work when she

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<sup>176</sup> R. 888-892.

<sup>177</sup> R. 1184-1189.

<sup>178</sup> R. 1403-1405.

wants to, and when she doesn't want to work, she doesn't." <sup>179</sup>

Jack Orloff, Orloff Sons, Inc., President of the Association, testified that in his plant he employed four or five inside workers who time tested the various crochet beading and hand embroidery jobs. <sup>180</sup>

Another aspect of home work which further complicates the obtaining of accurate data on the earnings of the individual home worker is the fact that the reported individual earnings frequently represent the production of more than one person although only one person appears upon the pay roll records of the embroidery manufacturer or contractor. The Economics Branch reported that:

Often the reported individual earnings represent the production of more than one person. Home workers [fol. 101] are frequently assisted in their work by other members of the family or by friends, who are not recorded on the embroiderer's pay rolls. For example, one home worker interviewed by an inspector of the Wage and Hour Division admitted that, assisted by members of her family, she had worked twice the number of hours recorded on her handbook upon each lot of work entered. In one case, a home worker reported that she was assisted by her mother and sister. For several weeks they had worked from 8 o'clock in the morning to twelve o'clock at night; the father also helped from seven to twelve o'clock at night. An uncle helped with the shopping and cooking of the meals and little time was consumed in eating. Instead of 70 cents an hour as shown by the entries in her handbook the actual average hourly earnings were about 20 cents an hour. <sup>181</sup>

That additional persons assist the home worker in her work in one way or another, although they receive no compensation therefor from the employer, was also borne out by the testimony of the home workers. Mrs. Lena La-

<sup>179</sup> R. 1002-1005.

<sup>180</sup> R. 1114-1117. Perry Meyerson, Meyerson Brothers, Inc., testified to the same effect with respect to the practices employed by his concern in fixing piece rates (R. 1197).

<sup>181</sup> Administrator's Exhibit 9, p. 31.

Galente, a home worker who testified on behalf of the Pleaters, Stitchers and Embroiderers Association, Inc. admitted on cross-examination that her sister-in-law commonly brought work to her from her employer and made deliveries of the completed work and that she herself customarily went to the employer's place of business only once a week.<sup>182</sup>

Mrs. Mary Comenzo, another home worker witness who testified for the Association, stated on cross-examination that she started to work on crochet beading at the age of 14, that she worked at home until she went into the factory [fol. 102] at 16, and that while she was engaged in home work at that time—

• • • there was a girl in the building, and she used to take in work. There was a store downstairs once, and she used to work there, and she really taught me how to work, and then finally I learned how, and then I worked home for a while until I got my experience.<sup>183</sup>

Mrs. Mamie Gangemi and Mrs. Francis Gagliardi, home worker witnesses for the Association, stated that they did not obtain home work from or deliver it to the employer. This was usually done in Mrs. Gangemi's case by her two 14 and 16 year old daughters, and in Mrs. Gagliardi's case by her husband.<sup>184</sup>

Mrs. Anne Locascio, another home worker who appeared for the Association, had been doing beading and spangling since she was 13 years old.<sup>185</sup>

Miss Branson Price, inspector of the Wage and Hour Division, New York Regional Office, testified that it had been found that during rush seasons all available persons in and around the home, including children as well as adults, worked on the goods. In the case of 302 home workers interviewed by her, she found that an additional 174 persons contributed some assistance to these workers. Fifty-eight of these assistants were under 16 years of age.<sup>186</sup>

<sup>182</sup> R. 1285.

<sup>183</sup> R. 1301.

<sup>184</sup> R. 846, 851, 823.

<sup>185</sup> R. 862-863.

<sup>186</sup> R. 703; see also McConnell, R. 276-277.

Miss Beatrice McConnell, Director, Industrial Division, Children's Bureau, United States Department of Labor, testified<sup>187</sup> concerning the importance of child labor in [fol. 103] tending to undermine minimum wages in the Industry. She stated that child labor has always been recognized as an integral part of the home work system of production since home work is basically a family system.<sup>188</sup> In the case of 7,251 minors found by the Children's Bureau as a result of inspections from October 24, 1938 to July 1, 1942 to be employed in violation of the child labor provisions of the Fair Labor Standards Act,<sup>189</sup> 898 were working in homes. Of the latter 243, or 27 per cent, worked on apparel, accessories, or other finished fabric products. Among the child home workers were 85 doing work for 19 embroidery firms in New York, New Jersey, Pennsylvania, and Illinois.<sup>190</sup> The employment of children below the age of sixteen in either factories or homes in the production of goods for interstate commerce is prohibited by the Act and such employment must, therefore, be hidden. This in itself contributes to the deterioration of minimum wage standards. Child labor is much more easily kept out of sight in home work than in factory work. As a general rule the employer himself is not in a position to know whether the home worker's children or any other children, or, in fact, any other persons, are contributing labor to the production of any individual home worker. The home worker herself has little incentive to control child labor, since she commonly works against a deadline the meeting of which is essential if she is to continue to get work from the employer. Anxious, as she is, to keep the work and to finish [fol. 104] it in time, it is difficult for Federal or State inspectors to obtain exact information from her as to assist-

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<sup>187</sup> R. 264-334; see also Price, 703-704.

<sup>188</sup> R. 264-265.

<sup>189</sup> Sec. 12, Fair Labor Standards Act.

<sup>190</sup> R. 272-273. Of 18 firms employing home workers found to be violating the child labor provisions of the Act, seven each were engaged in crochet beading and hand embroidery, and in lace cutting, and two each in Schiffli and hand-machine embroidery, and passementerie work (Administrator's Exhibit 9, p. 41; Appendix, table 3, p. 49).

ance received by her from other persons.<sup>191</sup> Miss Price stated that child labor violations are usually found only after extensive investigation of home workers in their homes.<sup>192</sup> Miss McConnell expressed the opinion that the problem of enforcement of the child labor provisions of the Act in home work is unique and presents special problems which are clearly not present in the enforcement of the provisions in the factory. The problem is an almost insurmountable one not only for law enforcement agencies but for employers and home workers themselves.<sup>193</sup>

The difficulties in ascertaining the wages paid to home workers are reflected in the records maintained by employers. Such records must be kept in accordance with regulations of the Wage and Hour Division.<sup>194</sup> It was found in the first days of its administration that the operation of the Fair Labor Standards Act tended to lead to an increased use of home work and in his first report to Congress, covering the period from August 15 to December 31, 1938, former Administrator Elmer Andrews stated:

The primary difficulty is to get an accurate record of the hours worked by employees working on material in their homes. Employers under the Act and under the regulations of this Division have the responsibility for keeping accurate records of hours worked each day and each week, and no difficulties present themselves in the keeping of these records for employees employed in factories. For the home worker, however, [fol. 105] it is an entirely different story—the employer has no direct method of determining the number of hours worked by a particular home worker or a family of home workers on a lot of goods because they do not perform their work under his immediate supervision.<sup>195</sup>

<sup>191</sup> Price, R. 700.

<sup>192</sup> R. 703.

<sup>193</sup> R. 329-334. See also Cheesman, R. 129; Beyer, R. 169.

<sup>194</sup> Title 29, c. V, Part 516, Code of Federal Regulations. See particularly Section 516.11. Administrator's Exhibit 10.

<sup>195</sup> Interim Report of the Administrator of the Wage and Hour Division, p. IV-4; see International Ladies' Garment Workers' Union Exhibit 5, page 25.

In January 1939, a hearing was held by the Administrator to consider special record-keeping requirements for employers of industrial home workers. As a result of the hearing, a system of dual records was established. The employer is required to maintain records which include information concerning the identity of the home worker, the time worked and piece rates paid with respect to each week of employment. The identity of agents, distributors, and contractors must also be indicated in the records. In addition to keeping these records, each employer of home workers must obtain from the Wage and Hour Division handbooks providing spaces for similar information. A handbook is required to be supplied by the employer to each home worker, and the information required therein must be entered by the employer or the person distributing home work on behalf of such employer each time work is given out or received from the home worker. Except for the time necessary for the making of such entries by the employer, the handbook must remain in the possession of the home worker.<sup>196</sup> These special record-keeping regulations for [fol. 106] home workers went into effect in the spring of 1939.

The evidence in this proceeding conclusively shows that there have been consistent and widespread violations of the record-keeping regulations by employers in this Industry.<sup>197</sup> The report of the Economics Branch contained in an analysis of the results of home work inspections of 222 firms in the Embroideries Industry made, with relatively few exceptions, between May 1, 1941 and May 1,

<sup>196</sup> Administrator's Exhibit 10; Administrator's Exhibit 11, copy of Wage and Hour Division Form CI-33, Record of Industrial Home Work Handbooks Issued; Administrator's Exhibit 12, Wage and Hour Division, Form CI-34, Acknowledgment of Receipt of Industrial Home Work Handbooks; Administrator's Exhibit 13, Home Worker's Handbook.

<sup>197</sup> Administrator's Exhibit 9, pp. 36-41; tables 17 and 18, pp. 37 and 38; Weiss, R. 20, 21, 583-584; Cheesman, R. 126, 127; Dahl, R. 354, 358, 364; Price, 698-700, 743-747, 756, 759; Lande, R. 1669; Beyer, R. 163; McConnell, R. 278, 279; Ackroyd, R. 107; Nachman, R. 421, 423; Administrator's Exhibits 19a and 19b.

1942.<sup>198</sup> These firms employed 4,369 home workers during the peak season preceding inspection. Compliance with all of the Act's provisions was found in the case of only 3 per cent of the inspected firms.<sup>199</sup> Inadequate, inaccurate, or no records at all were found in the case of 95 per cent of the 222 inspected firms; 211 firms were found to be violating the record-keeping requirements of the Act and the regulations of the Wage and Hour Division.

More than 90 per cent of the firms were found to be in violation of the handbook regulations; 46 per cent had not used handbooks at all prior to the date of inspection.<sup>200</sup> Approximately 40 per cent of the handbooks used were found to be inadequate or inaccurate in important respects; [fol. 107] in the case of 4 per cent of the firms in violation of record-keeping provisions, handbook records were maintained but the handbooks were not in the workers' possession. The most frequent violation was failure to keep proper records of the home workers' hours, "a most fundamental requisite in determining compliance." The report of the Economics Branch stated:

• • • In some cases, the absence of hours records was due to the difficulty or impossibility of securing an accurate estimate of hours from the home workers. In some cases, it was found that these violations were deliberate. Inspectors found evidence in a number of cases that the home work records of hours worked were manipulated for the purpose of concealing minimum wage and overtime violations. This was particularly true when the hours reported for home workers

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<sup>198</sup> Administrator's Exhibit 9, p. 35. All but 17 of the 222 firms were inspected subsequent to January 27, 1941, the effective date of the present wage order for the industry.

<sup>199</sup> Administrator's Exhibit 9, pp. 35, 36; table 17, p. 37.

<sup>200</sup> Administrator's Exhibit 9, p. 39. Interviews by representatives of the Wage and Hour Division with 1,131 home workers employed by the inspected firms showed that at least 50 per cent were not using handbooks. Of this group 60 per cent were employed in New York by New York firms.

were arrived at by dividing the earnings by the prevailing minimum wage<sup>201</sup>

[fol. 108] Substantial violations of the record-keeping provisions characterized each of the major types of embroidery homework—hand embroidery, crochet beading, Schiffli and hand-machine embroidery, passementerie, lace-cutting and laces and embroideries other than Schiffli or hand-machine.<sup>202</sup>

<sup>201</sup> Administrator's Exhibit 9, p. 39. Falsification of hours worked was frequently found to conceal assistance by members of the family or friends. In such cases it was impossible to determine the actual number of hours worked by either the home worker of record or those who were assisting her. The report of the Economics Branch stated (Administrator's Exhibit 9, pp. 39 and 41):

In numerous cases as shown by inspection reports, no records of any kind were maintained. One distributor, for example, paid a total of \$5,700 in wages to home workers in one year, and yet there was no record of the names, production, hours of work, earnings or other facts which should have been evidenced by pay roll data. Another distributor had no records of any kind, including those for cash receipts and disbursements; of course, no time records, nor any records of the quantity of work given out or piece rates paid were available. In another case, the only guidance was the gross dollar volume obtained by the distributor from the manufacturer who set the rate on the work contracted. The gross dollar volume was broken down by periods of the effective minima, after allocating deductions of overhead and profit for the distributor, in order to arrive at a rough determination of the wages paid and the restitution due.

Some employers kept records for only part of their home workers. Others kept records for only a part of the period of employment.

<sup>202</sup> Administrator's Exhibit 9, p. 39; tables 17 and 19, pp. 37 and 40. See Price, R. 698-699. Miss Price testified she had inspected 22 embroidery firms in New York City since May 15, 1941, and found that all of the firms were in viola-

Violations of the record-keeping requirements of the Act and the regulations of the Wage and Hour Division were shown even in the testimony of home workers who appeared at the hearings on behalf of employers opposed to the restriction or prohibition of home work.

Three of the home workers had no handbooks.<sup>203</sup> Mrs. Mildred Maretzo's handbook<sup>204</sup> showed that in weeks ending October 12, 1942, and October 19, 1942, she worked 47 and 49½ hours respectively but received no overtime compensation for the hours per week above 40.<sup>205</sup> No information was available in the handbook on hours worked per week, wages earned at regular piece rates, overtime [fol. 109] earned, deductions for Social Security tax and other purposes, net wages paid or average hourly earnings.<sup>206</sup>

Mrs. Florence Acerbo's handbook showed that for one week in August 1942, she worked 48 hours and received payment of 92 cents for overtime.<sup>207</sup>

A handbook issued by the Elite Embroidery Works of New York City to Mrs. Angelina Fugaro was not dated nor signed by the home worker; nor did it indicate, as required, the name and address of the person actually giving

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tion of one or more provisions of the Act. Inadequate records were found in the case of every firm investigated. One-third kept no records whatever for home workers, and two-thirds did not use handbooks required by the Division. See also Cheesman, R. 134. Mr. Cheesman testified a review of 78 case files dealing with embroideries establishments employing home workers showed 60 had been found to be in violation of the record-keeping regulations. Lande, R. 1667, 1668.

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<sup>203</sup> Mrs. Mamie Gangemi, R. 846; Mrs. Margaret Boarman, R. 1425; Mrs. Johanah Ethel Johnson, R. 1428, 1435.

<sup>204</sup> International Ladies' Garment Workers' Union Exhibit 4.

<sup>205</sup> R. 982.

<sup>206</sup> International Ladies' Garment Workers' Union Exhibit 4.

<sup>207</sup> International Ladies' Garment Workers' Union Exhibit 3.

out the work.<sup>208</sup> Workweek data were not supplied. Average hourly earnings were not indicated. A second handbook issued to Mrs. Fugaro was not signed by her nor were average hourly earnings shown.<sup>209</sup> The handbook contained no entries for the day, month and hour on which Mrs. Fugaro received lots of home work from the company between March 26, 1942, and October 3, 1942, except in three instances. In many cases the time when work was returned could only be inferred from other entries. Amounts deducted for Social Security Tax and other purposes, net amounts paid to Mrs. Fugaro and the times when payments to her were made were not shown.<sup>210</sup>

It is apparent that exact data on the hourly earnings of home workers are virtually impossible to obtain without actual home investigations of each home worker. It is also apparent that data obtained from records maintained by employees or from home worker interviews tend to overstate home workers' hourly earnings, rather than to underestimate them. In order to obtain the most accurate data possible for the purpose of this proceeding, the Economics Branch consulted inspection reports of the Wage and Hour Division for 173 firms which were inspected between January 27, 1941, when the present 37½-cents-per-hour wage order minimum became effective, and July 1, 1942.<sup>211</sup> The survey covered 832 home workers.

The report explained:

\* \* \* These reports are based on interviews with representative home workers by inspectors of the Wage and Hour Division during the course of their investigation to determine whether or not the Act is being violated. The estimates of hours worked and hourly earnings are made, as a rule, on the basis of the workers' records or recollection of the time consumed in completing the work on which she was most recently

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<sup>208</sup> Pleaters, Stitchers and Embroiderers Association Exhibit 6.

<sup>209</sup> Pleaters, Stichers and Embroiderers Association Exhibit 7.

<sup>210</sup> See also Administrator's Exhibits 19(a) and 19(b).

<sup>211</sup> Administrator's Exhibit 9, table 15, p. 33.

engaged. In some instances the estimates of time worked and hourly earnings were checked by the inspector through the use of time studies.

There can be little question that earnings data based on this type of investigation cannot be scientifically accurate. To the extent, however, that they represent approximations of the earning capabilities of a representative group of home workers, they do throw considerable light on the compliance problem involved in applying the Act to home workers \* \* \* <sup>212</sup>

The Economics Branch found that even during the boom period from January 27, 1941 to July 1942, 61.2 percent of the home workers in the Industry as a whole were paid less than 37½ cents an hour, in violation of the applicable minimum wage order. It was found that 52.6 percent of the home workers received less than 35 cents [fol. 111] an hour; nearly 30 percent less than 25 cents; and 17.4 percent less than 20 cents. Fifteen home workers, or 1.8 percent of the total number, were paid as little as 10 cents an hour or less. <sup>213</sup> The percentage receiving less than 37½ cents an hour was highest, 90.2 percent, in lace cutting and lowest, 23.3 percent, in crochet beading. Miscellaneous embroidery had 81.3 percent of the home workers receiving less than the wage order minimum, passementerie, 74.1 percent, hand embroidery, 72.6 percent, and Schiffli and Swiss hand-machine embroidery, 31.1 percent. <sup>214</sup>

<sup>212</sup> Administrator's Exhibit 9, p. 32. Most of the inspections were made during the course of a routine inspection drive in the Industry.

<sup>213</sup> Administrator's Exhibit 9, table 15, p. 33. Eight home workers engaged in hand embroidery, four in passementerie, two in lace cutting and one in miscellaneous embroidery were paid less than 10 cents an hour, according to the Wage and Hour Division's inspection reports.

<sup>214</sup> Administrator's Exhibit 9, table 15, p. 33. Distributors had the highest percentages of home workers receiving less than 37½ cents an hour, namely, 81.2 percent, but manufacturers and contractors, with 45.8 and 57.4 percent, respectively, also had very substantial numbers of home workers in this category. The percentage of home workers found in complaint cases to be receiving less than the wage order minimum wage was 71.1 as compared with 54.8 in noncomplaint cases. *Id.*, table 16, p. 34.

Miss Kate Papert, Director, Division of Women in Industry and Minimum Wage, New York Department of Labor, testified that routine visits by inspectors of the Home Work Bureau of the Division in the years 1941 and 1942 to 1,582 home workers in New York, of whom 633 worked on embroidery, showed that half of those engaged in hand rolling received less than 15 cents an hour, while those doing lace cutting and thread pulling averaged only 20 cents an hour. About 65 percent of the home workers engaged in straight embroidery work, about 62 percent of those working on trimmings, pipings and passementerie, about 86 percent in lace cutting and thread pulling, about 57 percent in embroidery design and about 50 percent in appliqueing and fagoting were paid less than 37½ cents [fol. 112] an hour. Twenty percent of the home workers engaged in crochet beading were paid less than 37½ cents an hour.<sup>215</sup>

The evidence in the record, including the report of the Economics Branch, which showed low subminimum earnings for the bulk of the home workers in this Industry, was not seriously contested at the hearing. Five New York City embroidery associations offered testimony of individual employers and individual home workers which endeavored to show that the hourly wages of the home workers employed by members of the association were above the applicable minimum.<sup>216</sup> This testimony was confined to wages

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<sup>215</sup> R. 1480-1482; New York Department of Labor Exhibits 8, 9 and 10. The figures cited are estimates based upon the assumption that half of the home workers receiving between 35 and 40 cents an hour were paid less than 37½ cents an hour. The percentages of home workers engaged in the various types of embroidery paid less than 35 and 40 cents an hour, respectively, were: for all embroidery home workers, 46.6 and 58.7; in straight embroidery, 56.2 and 73.2; in pipings, trimmings and passementerie work, 58.8 and 65.8; in lace cutting and thread pulling, 81.3 and 90.6; in embroidery design, 54.4 and 61.4; in appliqueing and fagoting, 45.8 and 54.2; in crochet beading, 14.9 and 23.7. All of the home workers engaged in hand rolling were paid less than 37½ cents an hour.

<sup>216</sup> Friedensohn, R. 994, 995, 1031, 1032; Alpine, R. 1256; Meyerson, R. 1196; Geller, R. 1237; Orloff, R. 1094; Stern,

paid to home workers engaged in crochet beading and hand embroidery including veil dotting and bullion embroidery on military and naval insignia devices for officers.

The employers contended that the piece rates established for crochet beading would yield on the average between 50 and 75 cents per hour, while the piece rates for hand em-[fol. 113] broideries would yield between 40 and 60 cents an hour. These figures were admittedly estimates based upon the amount of time required, in the judgment of the employers, for completion of different lots of work, as calculated by their timing of sample makers in the factories. No testimony was presented by the employers with respect to the earnings of veil dotters in the homes, with the exception of the negotiations leading to a consent decree issued in June 1942. In the case of home workers doing bullion embroidery for military and naval insignia, the only evidence in support of the contention that a high rate is earned was a statement to that effect by a manufacturer who produced such embroidery together with other types of hand embroidery.<sup>217</sup>

The testimony of the home workers on cross-examination revealed that they were under a serious misapprehension as to the hourly earnings which they received at the piece rates established by their employers. Mrs. Mary Franks, a witness for the Pleaters, Stitchers and Embroiders Association, Inc., of New York City, for example, stated that her hourly earnings on the operation of crochet beading were between 60 and 70 cents an hour.<sup>218</sup> Examination of her handbook, however, showed that, assuming its accuracy without a time study, her average hourly earnings were 30 cents lower than her estimate in some weeks during the

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R. 1262; Franks, R. 783; Gagliardi, R. 821, 822; Gangemi, R. 834; Locascio, R. 861; Pelino, R. 881; Acerbo, R. 943; Maretzo, R. 976; Fugaro, R. 1183; LaGalente, R. 1278; Comenzo, R. 1300; Panzeca, R. 1316; Pillischer, R. 1330; White, R. 1397; Boarman, R. 1420; Johnson, R. 1427.

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<sup>217</sup> Friedensohn, R. 1032; Orloff, R. 112-113; Meyerson, R. 1197, 1203, 1212-1213; Geller, R. 1239, 1241; Landau, R. 905-920, 1672-1684; Sprung, R. 1443-1446.

<sup>218</sup> R. 784-785, 790.

period September to November 1942.<sup>219</sup> Similar discrepancies were shown in the testimony of Mrs. Jean Pelino,<sup>220</sup> and Mrs. Angelina Fugaro.<sup>221</sup>

[fol. 114] In the absence of time studies, it is not possible to determine the accuracy of the handbooks or the testimony offered with respect to the earnings of individual home workers. Statements of home workers engaged in crochet beading who were interviewed by inspectors of the New York regional office of the Wage and Hour Division in October 1942 that their earnings generally exceeded the minimum<sup>222</sup> must be considered in the light of this fact. I must also take into account the fact, which is abundantly proved in the record, that the home workers who testified at the hearing were selected by the parties to the proceeding.<sup>223</sup> Furthermore, the evidence shows that they were typically persons who had long experience in the Industry.<sup>224</sup> It is apparent that under any piece-rate system

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<sup>219</sup> International Ladies' Garment Workers' Union Exhibit 2.

<sup>220</sup> R. 881, 889, 897; see also R. 887-888, 901-902.

<sup>221</sup> R. 1173-1174, 1189-1190.

<sup>222</sup> Price, R. 707-708. Of the 66 home workers questioned, 25 did not have handbooks with them against which their statements could be checked. Miss Price testified "No effort was made to substantiate either the handbook record or the employees' statements." Three of the home workers interviewed reported they received 30 cents an hour.

<sup>223</sup> Franks, R. 797-800, 805; Gangemi, R. 851-853, 857; Pelino, R. 903-904; Acerbo, R. 954-955, 967; Maretzo, R. 987-991; Pillischer, R. 1330-1331; White, R. 1399; Johnson, R. 1430.

<sup>224</sup> Mrs. Florence Acerbo testified that she had had about 15 to 20 years' experience as a crochet beader (R. 962) and that she thought her time on the various lots of work must be the same as that of the sample makers "because when they give me that amount of work I usually take the same she does" (R. 963). Mrs. Mildred Maretzo had also done work as a crochet beader for about 15 years (R. 977) and thought that it usually took her less time to do the work than the time set for each piece by the employer on the basis of the sample maker's work (R. 978). See also Fugaro,

certain workers of high productivity will earn the minimum and more. This does not in any way disprove the fact that workers of lesser productivity may not earn the minimum. [fol. 115] Indeed, the very workers who appeared in behalf of their employers stated that other home workers were not as skilled.<sup>225</sup> Accordingly, I have determined that greater weight must be given to the statistical studies of the Economics Branch of the Wage and Hour Division and of the New York State Department of Labor, than to the statements of the home workers and home work employers.

Additional information supplied by the Economics Branch showed that of 22 firms employing home workers in New York, Pennsylvania, and Illinois in the operations of crochet beading and hand embroidery 11, or 50 percent, violated the applicable minimum wage provisions of the Act and the present wage order. Ten firms, or 45 percent, violated the minimum wage order. An additional 12 firms, which were primarily engaged in crochet beading, were analyzed, and it was found that five, or 41 percent, had violated minimum wage requirements of the Act or wage order during this period and four, or 33 $\frac{1}{3}$  percent, had violated the minimum wage order.<sup>226</sup>

Analysis of inspected firms according to average hourly earnings by principal operations performed by the home worker during the period January 27, 1941 to July 1, 1942, showed that 72.6 percent of the home workers principally doing hand embroidering, which includes bullion embroidery, were paid less than 37 $\frac{1}{2}$  cents an hour and 26.5 percent during this period received less than 20 cents an hour. In miscellaneous embroidery operations, which include veil dotting, 81.3 percent of the home workers received less than the minimum and 37.5 percent received less than 30 cents an hour. Of the home workers engaged principally in

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R. 1184; LaGalante, R. 1276, 1289-1290; Comenzo, R. 1299-1300, 1301-1302; Panzeca, R. 1315-1317, 1322-1324; White, R. 1397, 1399, 1400-1403; Boarman, R. 1419; Johnson, R. 1426.

<sup>225</sup> Locascio, R. 867; Gagliardi, R. 821-822, 825; Gangemi, R. 834-835, 853.

<sup>226</sup> Administrator's Exhibit 18.

[fol. 116] crochet beading, 23.3 percent received less than the applicable minimum.<sup>227</sup>

The study of the New York State Department of Labor confirms this picture of substantial violation of the minimum wage in the Industry as a whole, and in its various branches.<sup>228</sup>

Assuming that I could accept the contention that piece rates for certain operations in this Industry are high enough to yield the minimum, there does not seem to be any basis for concluding that an administratively feasible distinction can be made which would permit the continuation of home work with respect to those operations. It is apparent that any order regulating, restricting, or prohibiting home work would have to be administered with respect to the persons engaged as employers and employees in the Industry. The facts in the record show that in many cases the individual home worker may be engaged in different types of operations. Even if there is specialization during particular seasons, the employee performs different types of work during the year. Similarly, the employer handles different types of embroidery except in unusual cases.<sup>229</sup>

The evidence does not demonstrate that there is sufficient distinction between employees on the basis of operations performed to warrant administration on this basis, even if otherwise justified. In this connection, it may be noted that the wage report of the Economics Branch was made on the basis of classification of home workers by *principal* operations, although the home workers were commonly engaged in other operations as well.

[fol. 117] In view of the competitive relationship between different types of embroidery, any regulatory, restrictive, or prohibitory order affecting only certain operations would create a competitive disadvantage for the employers engaged in those operations. These employers would be forced to meet the strict controls enforceable in the case of

<sup>227</sup> Administrator's Exhibit 9, table 15, p. 33.

<sup>228</sup> New York Department of Labor Exhibit 10.

<sup>229</sup> Administrator's Exhibit 9, p. 13; Friedensohn, R. 992, 1060-1063, 1086; Meyerson, R. 1221-1223; Geller, R. 1235; Alpine, R. 1248-1250; Ganz, R. 1268; Sprung, R. 1458, 1461-1463.

factory employment, whereas their competitors would be able to resort to the evasive practices characteristic of unrestricted home work. To cover part of the Industry with a prohibition of home work, while permitting home work in other parts would also permit evasion of the prohibition in that part of the Industry to which the prohibition applied.<sup>230</sup> I conclude that the evidence in the record does not support the separate treatment of different embroidery operations, as a matter of administrative feasibility, insofar as the regulation, restriction, or prohibition of home work in the Industry is concerned.

### *C. Regulation of Industrial Home Work in the Embroideries Industry*

The long course of experience with industrial home work has demonstrated its detrimental effect on labor standards and has shown that labor conditions in home work cannot be controlled.<sup>231</sup> Many efforts have been made to correct this situation. After unsuccessful union and legislative efforts to bring home work under control in the nineteenth century,<sup>232</sup> 12 States passed legislation during the eighteenth [fol. 118] nineties designed to restrict and regulate tenement workshops.<sup>233</sup> Effective enforcement was impossible, however, and home work remained a serious problem.<sup>234</sup> Although sweatshops were wiped out by legislation<sup>235</sup> and home work was limited by unions through collective bargaining agreements providing for abolition,<sup>236</sup> the agree-

<sup>230</sup> See the testimony of Mrs. Clara M. Beyer, Assistant Director, Division of Labor Standards, United States Department of Labor, R. 169-171.

<sup>231</sup> Beyer, R. 182, 183; Ackroyd, R. 87-94; Papert, R. 1478-1488; Division of Labor Standards Exhibits 2, 8, 17, 20, 21, 25; International Ladies' Garment Workers' Union Exhibit 5.

<sup>232</sup> Division of Labor Standards Exhibit 21, pp. 11-15.

<sup>233</sup> Division of Labor Standards Exhibit 4, p. 3; International Ladies' Garment Workers' Union Exhibit 5, p. 9.

<sup>234</sup> Division of Labor Standards Exhibit 21, p. 18.

<sup>235</sup> *Id.*, pp. 18-20, inclusive.

<sup>236</sup> International Ladies' Garment Workers' Union Exhibit 5, p. 10.

ments were limited in scope and anti-sweating laws proved totally inadequate where home work was concerned.<sup>237</sup>

A subsequent period of legislative regulation by a few States aimed directly at home work and an extension of anti-sweating laws achieved little effective control prior to 1930.<sup>238</sup> Labor unions faced with the problem of safeguarding wage standards succeeded in including provisions in collective bargaining agreements for the abolition of home work.<sup>239</sup>

Years of depression during the thirties gave rise to increased home work and renewed attempts to control it. Control of home work was sought in new State laws providing for abolition by administrative order,<sup>240</sup> and these laws became the only effective statutory approach to a problem generally considered beyond regulation.<sup>241</sup>

[fol. 119] During the same period of depression, action was taken by the National Recovery Administration to restrict home work under codes issued pursuant to the National Industrial Recovery Act.<sup>242</sup> The general purpose of this Act was to establish codes of fair competition by administrative order raising labor standards and preventing unfair trade practices. Minimum wages and maximum hours were established industry by industry. Industrial home work was not mentioned specifically in the Act. Nevertheless, 118 of the 556 codes included home work provisions.<sup>243</sup> Eighty-six percent of the 118 prohibited home

<sup>237</sup> Division of Labor Standards Exhibit 21, pp. 18-20.

<sup>238</sup> Division of Labor Standards Exhibit 21, p. 25; International Ladies' Garment Workers' Union Exhibit 5, pp. 19-23 and Appendix.

<sup>239</sup> International Ladies' Garment Workers' Union Exhibit 5, pp. 11, 12; Division of Labor Standards Exhibit 21, pp. 25-27.

<sup>240</sup> Division of Labor Standards Exhibit 21, p. 35.

<sup>241</sup> *Id.*, pp. 36-40.

<sup>242</sup> Act of June, 1933, c. 90, 49 Stat. 195; Division of Labor Standards Exhibit 4, pp. 6, 7; Division of Labor Standards Exhibit 21, pp. 28-31; International Ladies' Garment Workers' Union Exhibit 5, pp. 23-33.

<sup>243</sup> Division of Labor Standards Exhibit 21, pp. 28 and 29.

work; the balance merely attempted regulation. In spite of none too effective enforcement, home work was greatly reduced. Its volume turned sharply upward, however, when the National Industrial Recovery Act was declared unconstitutional.<sup>244</sup>

This review of the documents and exhibits in the record summarizing the various attempts to control home work in general prior to the Fair Labor Standards Act leads to the conclusion that labor conditions in industrial home work are not susceptible to regulation. Industrial home work occupies in the Embroideries Industry as important and characteristic a place as in any apparel or related industry and was a major factor contributing to the fact that prior to the Fair Labor Standards Act its history was one of exceptionally low wages, long hours and unsatisfactory [fol. 120] working conditions.<sup>245</sup> In 1933, many employers and employers' associations, as well as Federal and State agencies, welfare organizations and labor unions appealed to the National Recovery Administration to restrict home work in codes applicable to the Embroideries Industry in order to provide better means of achieving the stabilization of wages, working conditions, trade practices and prices which were the objectives of the codes.<sup>246</sup> Prohibition or limitation of industrial home work was provided for in codes for four branches of the Industry: Schiffli Hand-Machine Embroidery and Thread and Scallop Cutting; Pleating, Stitching and Bonnaz and Hand Embroidery; Art Needlework; and Slit Fabric Manufacturing.<sup>247</sup> The decision of the United States Supreme Court

<sup>244</sup> *Schechter Corp. v. United States*, 295 U. S. 495 (1935); International Ladies' Garment Workers' Union Exhibit 5, p. 34.

<sup>245</sup> Beyer, R. 150; Papert, R. 1479, 1480; Friedensohn, R. 993, 994; Orloff, R. 1097; Weinberg, R. 1582-1584; Division of Labor Standards Exhibits 1-8; International Ladies' Garment Workers' Union Exhibits 6-9.

<sup>246</sup> Beyer, R. 147, 148, 150; Friedensohn, R. 993, 994; Division of Labor Standards Exhibits 1-5; International Ladies' Garment Workers' Union Exhibit 6, pp. 1, 5, 7, 8.

<sup>247</sup> Beyer, R. 159; Friedensohn, R. 993; Division of Labor Standards Exhibit 9; Division of Labor Standards Exhibit 4, p. 43.

in the *Schechter* case,<sup>248</sup> declaring the National Industrial Recovery Act unconstitutional, was followed by general deterioration of wage standards, and home work again became widespread in the Industry.<sup>249</sup>

[fol. 121] Eight States have in recent years enacted legislation prohibiting home work generally or in specific in-

<sup>248</sup> 295 U. S. 495 (1935).

<sup>249</sup> In 1937 inspectors of the Home Work Bureau of the New York Department of Labor interviewed 1,800 workers performing embroidery work of all kinds in the home. Hourly earnings at that time ranged from 9 cents per hour for embroidery on infants' apparel to 17 cents per hour for trimmings (Papert, R. 1479, 1480).

Abraham Friedensohn, Public Art Embroidery, Inc., New York, New York, testified before Industry Committee No. 15 for the Embroideries Industry on September 4, 1940, that "it is impossible to control the hand embroidery situation because the work is being done at home" and that this was "a statement we can all take for granted because the situation exists" (R. 1037). He testified further that: "In 1933 when the N. R. A. was established, and our industry is on record that we have all made an honest effort to eliminate the evils of the so-called bedroom shops . . . we maintained at that time that if we would eliminate homework and would set up a minimum wage for the workers in our places that would uplift industry and it would give us manufacturers a chance for a better livelihood. . . . It would also eliminate those very (I have no word for those evils) evils that are beyond human imagery. . . . At the time when the code was drawn up for our industry—we were included originally—we pleaded that homework be eliminated. . . . Another part of the industry walked up at the same time and they said that if homework would be eliminated they would be deprived of their livelihood and their wages. . . . They considered their protest at that time. A hearing was held by the administrator of the N. R. A. and until the N. R. A. was abolished homework was never abolished. . . . However, at the time when we had the idea that homework would be abolished the workers began to get better pay; . . . but the minute the N. R. A. was abolished and homework continued as freely as before the same thing went on all over again. . . ."

dustries, including the Embroideries Industry, or have delegated authority to State administrative agencies to issue [fol. 122] regulatory or prohibitory orders.<sup>250</sup> Variations in local standards have, however, resulted in a confused situation in the Industry, evasive practices, including the shifting of home work from States that have attempted to

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Whatever we did then in an effort to raise the workers' wages during the time that we had contemplated the end of homework was forgotten. You can readily see this, anyone who has knowledge about the time it takes to make ~~an average piece of embroidery the way it is sold in the stores today~~. It is sold for such ridiculously low prices that I sometimes wonder how any human being can have the heart to employ people for such low wages as to produce embroidery for such prices." See R. 1073-1074. Since essential relationships between manufacturers and contractors are not, despite Mr. Friedensohn's statement to the contrary (R. 1037), basically any different at the present time than they were in September 1940 (*supra*, pp. 56-63), the views expressed by him before Industry Committee No. 15 would also appear to be applicable to the effects of home work on conditions in the Industry including minimum wages, at the present time.

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<sup>250</sup> The State of Connecticut prohibits any distribution of home work. Oregon's prohibition extends to all manufacturing industries. In California home work has been restricted in the Garment Manufacturing Industry to workers unable to adjust to factory work because of age, physical or mental disability, or whose services are needed to care for an invalid in the home. Rhode Island has by administrative order prohibited home work in the Wearing Apparel and Allied Industries. New York has similarly prohibited or restricted home work in four industries—Men's and Boys' Clothing, Men's and Boys' Neckwear, Artificial Flowers and Feather, and Gloves. New York has also prohibited distribution of home work by other than genuine contractors and manufacturers. New Jersey has restricted the number and employment of home workers. Beyer, R. 166, 167; Ackroyd, R. 88, 89; Papert, R. 1486, 1499; New York Department of Labor Exhibit 12; Division of Labor Standards Exhibits 10 and 11.

regulate or prohibit it to other States, in which it is permitted, competitive inequalities and consequent continued depression of wage standards. It is the nearly unanimous viewpoint of Federal and State officials having experience in the administration of labor laws, that since home work is a Nation-wide problem, regulation, restriction or prohibition of industrial home work must be on a Nation-wide basis if minimum wage standards are to be preserved and upheld.<sup>251</sup>

Experience under the Fair Labor Standards Act of 1938 has also indicated that labor conditions in industrial home work in this Industry are not susceptible to regulation that will guarantee that the home worker will be paid the established minimum rate. Home workers engaged in the production of goods for commerce are required to be paid the established minimum rates. The Economics Branch of the [fol. 123] Wage and Hour Division presented the results of home work inspections of 222 firms in the Embroideries Industry, which reported the employment of 4,369 home workers during the peak season preceding the inspection. With few exceptions, the inspections were made between May 1, 1941 and May 1, 1942, when a special home work inspection drive in the Embroideries Industry was conducted.<sup>252</sup> Compliance with the Act has been the exception rather than the rule.<sup>253</sup>

In the first instance, full and accurate records are a basic factor in securing effective enforcement. The evidence in the record on the extent of compliance with the record-keeping regulations of the Wage and Hour Division<sup>254</sup> was summarized in an earlier section of this opinion.<sup>255</sup> It shows

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<sup>251</sup> Cheesman, R. 681; Beyer, R. 166-168; Papert, R. 1488; Ackroyd, R. 93, 94; Division of Labor Standards Exhibit 25.

<sup>252</sup> Administrator's Exhibit 9, pp. 35-45. The entire period covered by the inspections studied was January 27, 1941 to July 1, 1942. More than 63 per cent of the cases involving approximately 48 per cent of the home workers were non-compliant inspections *id.*, p. 35.

<sup>253</sup> *Ibid.*

<sup>254</sup> Title 29, c. V, Part 516, Code of Federal Regulations.

<sup>255</sup> *Supra*, pp. 72-78.

that inadequate, inaccurate, or no records at all were maintained by 211 of the 222 firms with respect to their home workers, that more than 90 percent of the firms violated the handbook regulations, that 46 percent had not used handbooks at all prior to inspection, that 40 percent of the handbooks used were inadequate or inaccurate, and that violations of the record-keeping regulations were found in the case of every major type of embroidery performed in the homes.<sup>256</sup> Violations of the record-keeping regulations were [fol. 124] clearly shown in the testimony of home workers who appeared at the hearing.<sup>257</sup>

Sixty percent of the firms were found not to be in compliance with the minimum wages required by the Act.<sup>258</sup> Among these firms were 70 percent of those whose home workers performed principally hand embroidery and crochet beading, 68 percent of the firms whose home workers did passementerie, 30 percent of the concerns whose home workers engaged in Schiffli and hand-machine embroidery and all the lace-cutting firms.<sup>259</sup> Forty-three per-

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<sup>256</sup> Administrator's Exhibit 9, p. 39; tables 17 and 19, pp. 37 and 40. Price, R. 698-699; Cheesman, R. 134; Lande, R. 1667-1668.

<sup>257</sup> Four of the home workers, Mrs. Mamie Gangemi, Mrs. Frances Gagliardi, Mrs. Margaret Boarman, and Mrs. Johannah Ethel Johnson had no handbooks (R. 830, 854, 1428, 1432, 1433). See the testimony of Mrs. Mildred Maretzo, R. 982, International Ladies' Garment Workers' Union Exhibit 4, and the handbooks of Mrs. Angelina Fugaro (Pleaters, Stitchers and Embroiderers Association Exhibits 6 and 7).

<sup>258</sup> Administrator's Exhibit 9, p. 41; table 17, p. 37. See also Price, R. 699-701; Cheesman, R. 125, 126, 134; Dahl, R. 352-355; Ackroyd, R. 92; Beyer, R. 161-163; Papert, R. 1480-1438; New York State Department of Labor Exhibit 10.

<sup>259</sup> Administrator's Exhibit 9, p. 41. Reports on the earnings of home workers visited in 1941 and 1942 by inspectors of the Bureau of Homework Inspection, New York State Department of Labor, showed that the median average hourly earnings were 33.5 cents for hand embroidery, 44.2 cents for crochet beading, 32.6 cents for trimmings, piping and passementerie, 20.0 cents for lace cutting and thread

cent of the manufacturers, 58 percent of the contractors and 81 percent of the distributors were in violation of the minimum wage provisions.<sup>260</sup>

A factor of considerable importance in determining whether home workers are paid the minimum is the common practice of requiring home workers to pick up and return [fol. 125] the work allotted to them. This ordinarily involves several hours of travel time each week for the home worker, members of her family, or friends.<sup>261</sup> When travel to the factory is required by the employer and occurs regularly, the time consumed therein is regarded as hours worked and must be taken into account in determining whether the minimum rate or rates prescribed by the Act or an applicable wage order are being paid.<sup>262</sup> Generally, however, time so spent is not taken into account by the employer in fixing the piece rates.<sup>263</sup>

A further tendency toward violation of minimum wage requirements grows out of the casual manner in which home work is carried on.<sup>264</sup> There are obvious causes or inducements for the home worker to obtain and receive assistance from members of her family and other persons. Such assistance is frequently hidden from the employer and can be ascertained only by visits to the home workers' homes.<sup>265</sup>

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pulling, 34.3 cents for embroidery design, 37.5 cents for applique and fagotting, 14.7 cents for hand rolling, and 36.5 cents for miscellaneous operations. (New York State Department of Labor Exhibit 10.)

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<sup>260</sup> Administrator's Exhibit 9, p. 41.

<sup>261</sup> Price, R. 702-708; Acerbo, R. 953, 954, 964; Fugaro, R. 1182; LaGalente, R. 1285-1288, 1295-1296; Panzeca, R. 1320-1321; White, R. 1416; Boarman, R. 1423.

<sup>262</sup> If more than one trip per day is made to the factory, however, only one trip is regarded as hours worked which must be paid for in compliance with the Act.

<sup>263</sup> Price, R. 702, 708; Boarman, R. 1422.

<sup>264</sup> Administrator's Exhibit 9, p. 31; Price, R. 703; McConnell, R. 276-277; Cheesman, R. 126-127; Dahl, R. 479-480; LaGalente, R. 1285; Comenzo, R. 1301; Gangemi, R. 846, 851.

<sup>265</sup> Price, R. 703; McConnell, R. 276-277.

Thus, the very factors which make home work seem attractive to the home workers, namely, the absence of factory discipline, the fact that the work can be done on the worker's own time, and in a casual way, and that she is enabled to attend at the same time to her household responsibilities [fol. 126] while supplementing the family income,<sup>266</sup> preclude any possibility of reasonable assurance that even home workers who, on the basis of the piece rates paid, seem to be earning the minimum wages prescribed by the Act are in any given case actually receiving the minimum.

The inspectors of the Wage and Hour Division who testified at the hearing emphasized the almost insuperable task of discovering minimum wage and other violations in home work in the Industry and of estimating back wages due the home workers where records are inaccurate or inadequate. Home work inspections require five to twenty times the number of days required for factory inspections. Due to employer and home worker forgetfulness and lack of cooperativeness, together with the characteristic absence of adequate records, the problem of calculating restriction in home work cases has been difficult.<sup>267</sup> Violations are found not only in the case of first inspections of individual concerns but also in second and third inspections. Such inspections are costly and generally unproductive of satisfactory results whether from the point of view of securing compliance with the Act on the part of employers or from the point of view of obtaining restitution for home workers for unpaid minimum wages and overtime.<sup>268</sup> Even when constant contact is maintained by the Division with employers of home workers, violations of the Act are persistent. The willingness of employers to comply by no means assures compliance since the conditions under which home work is performed are largely outside their control.<sup>269</sup>

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<sup>266</sup> Acerbo, R. 943, 951-952, 956, 964, 967-968; Maretzo, R. 976, 977; Fugaro, R. 1172-1174; LaGalante, R. 1277-1279; Comenzo, R. 1300, 1301, 1302, 1303; Panzeca, R. 1315-1317, 1321, 1324-1327; White, R. 1398; Boarman, R. 1418-1419; Johnson, R. 1425-1427.

<sup>267</sup> Cheesman, R. 126-133.

<sup>268</sup> Dahl, R. 352-354, 357-358.

<sup>269</sup> R. 705.

[fol. 127] I conclude, upon the entire record, that industrial home work in the various branches of the Embroideries Industry furnishes a ready means of circumventing or evading the minimum wage order for this Industry and that there has been wholesale violation of the record-keeping and minimum wage requirements of the Act and regulations issued thereunder.

Considerable testimony was introduced on the question of the accuracy of determining wages and hours of work on the basis of piece rates established by time testing the sample maker in the factory. The evidence shows that piece rates cannot practically be set so as to reflect accurately the hours of work of the home worker or secure reliably a definite hourly wage. Home work conditions are not subject to control or standardization as are those in the factory. Employers have no supervision or control over the home worker's hours of work.<sup>270</sup> The home workers themselves vary greatly in skill, productivity, and efficiency.<sup>271</sup> Styles and operations also vary greatly.<sup>272</sup>

Nathan Weinberg, Associate Economist, International Ladies' Garment Workers' Union, testified:

Almost invariably when the question of restricting home work comes up it is suggested that the problem might be solved through the fixing of piece rates. But [fol. 128] this proposal has to be considered in the light of the fact that the Fair Labor Standards Act provides not for the payment of an average wage but for the payment of a minimum wage and at best an idea-system of piece rate fixing will approximate an average wage. That is, you can fix a piece rate with the idea in mind that you want the piece rate to yield the workers

<sup>270</sup> Administrator's Exhibit 9, pp. 28-31; Ackroyd, R. 92, 113; Beyer, R. 165; Dahl, R. 458-460, 474-475; Weiss, R. 26, 456; Price, R. 743, 744, 747-749; Papert, R. 1536; Weinberg, R. 1600-1606, 1616-1617; Nachman, R. 439-441, Friedensohn, R. 1020-1036; Orloff, R. 1112-1120, 1155-1159, 1169.

<sup>271</sup> Administrator's Exhibit 9, pp. 28, 29; Beyer, R. 165, 166; Cheesman, R. 127; Weinberg, R. 1600; Nachman, R. 439; Orloff, R. 1132-1153.

<sup>272</sup> Administrator's Exhibit 9, p. 28; Beyer, R. 165; Weiss, R. 25, 26; Price, R. 737; Papert, R. 1542; Orloff, R. 1137-1145.

who work on that piece rate 90 cents an hour. If you have been able to work out the piece rate properly, the average worker will earn 90 cents an hour, but there is no way of knowing what the slowest worker will make. In statistical terms the minimum wage would be at the lower or left-hand of a distribution, while the average would be the measure of central tendency in that distribution. The average would vary from the minimum in accordance with what statisticians call dispersion. In wage distribution, dispersion is a result of a number of factors. One of these is plain and simple human variability. The second is the method by which work is performed, whether or not all workers engaged in the work use the same motions, the same tools, and the third thing is the conditions under which the work is performed, the light, the seating arrangements, the work table, the ventilation and so on. In a factory, on the whole, conditions are standardized within that factory. Lighting is the same all over the factory, the chairs generally are uniform, the tables are uniform, and so on. And frequently in a factory, I believe, where industrial engineers are employed, the methods of performing the work are also standardized. That is, the engineer will watch a group of workers, analyze their motions to determine which motions yield the most rapid performance of a particular operation and then train all workers the use of those particular motions in performing a specific operation. Yet even in [fol. 129] a factory where conditions are standardized and where methods are standardized, it has been found that the third factor, human variability, results in ratios of productivity range as high in one case as 5.1 to 1.<sup>273</sup>

Jack M. Orloff, President of the Pleaters, Stitchers and Embroideries Association, Inc., of New York City, proposed, in addition to the elimination of contractors in home work,<sup>274</sup> that regulations be issued providing that no home

<sup>273</sup> R. 1600-1601.

<sup>274</sup> The significance of contractors and distributors in determining the conditions under which industrial home work in the industry is carried on is discussed in another section of this opinion (*supra*, pp. 56-63).

workers may be given in one week more than 40 times the amount of work which the sample maker can produce in one hour as determined by a time-study. Mr. Orloff proposed that it be required that at least one factory worker be employed on every type of work done by a home worker so that a basis would exist for comparing the effect of established piece rates in both the factory and the home. He also urged that the home work handbooks be revised and simplified.<sup>275</sup> The essential difficulty in attempting to apply factory piece rates, whether determined on the basis of the sample maker's work or in any other manner, to home workers, is however, that conditions in the factory are not comparable with those in home work.<sup>276</sup> Mere changes in record-keeping requirements would not eliminate the practice [fol. 130] which have resulted in undermining minimum wage standards.<sup>277</sup> Upon the basis of the facts dis-

<sup>275</sup> R. 1099.

<sup>276</sup> Administrator's Exhibit 9, p. 28; Weiss, R. 546-548, 551-552, 592-595, 652-654; Cheesman, R. 125-127, 132-133, 685-689, 692-695; Dahl, R. 458-460, 474-475; Price, R. 737, 747-749; Lande, R. 1664-1666; Friedensohn, R. 1403-1405; Orloff, R. 1002-1005, 1114-1117; Acerbo, R. 949-950; Pelino, R. 888-892; White, R. 1184-1189; Weinberg, R. 1602-1603.

<sup>277</sup> Ranges in productivity of workers in factories are restricted by standardization and control of operations. Close supervision of the piece rates is possible. Their adjustment is constant and relatively simple, based upon the observed effects of their operation. Detailed records of productivity and hours enable ready determination of whether a worker has earned the minimum. Even under factory conditions, however, variations from the established norms are considerable. In home work, on the other hand, there is no way of knowing whether the piece rates fixed on the basis of the sample maker's work under factory conditions bear any relationship whatever to a rate which will guarantee the home workers the minimum wage. Adequate records are not available. The conditions of work vary widely. The absence of records makes impossible any exact calculations of the amounts of make up that must often be paid to large numbers of home workers by virtue of their failure to produce in accordance with the established standards. Weinberg, R. 1602-1603.

closed by the record, it would be necessary, in order to arrive at piece rates that would guarantee the minimum wage, either to adopt the alternative of setting the rates at levels which will guarantee the minimum to the home worker of least productivity, which is impossible from a business [fol. 131] standpoint,<sup>278</sup> or to adopt the equally impossible alternative from an administrative standpoint of setting individual rates for each home worker in each of the numerous operations in the manufacture of embroidery to which she might be assigned.

Few home work operations in the Embroideries Industry are definite or standardized.<sup>279</sup> Barnett W. Landau, Executive Director, Veil Dotters' Association of America, Inc., New York, New York, alleged that upon the basis of time tests of home workers employed as veil dotters by members of his association, it was determined that a piece rate of

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<sup>278</sup> Conceivably a sufficiently high piece rate could be fixed so that the average home worker on any given operation would be paid the minimum. Such a piece rate would, however, have to be so high that few, if any employers could afford to pay it. If the range in productivity between the fastest and slowest workers were as much as 5.1 to 1, the same piece rate that would yield the slowest worker the minimum rate of 40 cents per hour would give the fastest worker \$2.00 per hour. See International Ladies' Garment Workers' Union Exhibits 11 (a), (b), and (c).

Under Section 6(a)(4), every employee on the mainland, unless otherwise exempt, must receive the applicable minimum *hourly* rate. Section 6(a)(5) of the Act permits payment of piece rates in Puerto Rico and the Virgin Islands which are "commensurate" with applicable minimum hourly rates and authorizes the Administrator to establish standards for piece rates including the proportion or class of employees who shall receive not less than the minimum hourly rate. It is only pursuant to this section of the Act that the limited class of employees in Puerto Rico and the Virgin Islands may be legally paid on a basis which does not yield the applicable hourly minimum to all employees subject to the Act.

<sup>279</sup> ~~Menders~~ of Schiffli and hand-machine embroidery are customarily paid an hourly wage rather than on a piece rate basis. Administrator's Exhibit 9, p. 29.

three cents per hundred dots would be sufficient to assure the home workers the present minimum wage of 37½ cents an hour.<sup>280</sup> This rate was recognized for enforcement purposes by the New York Regional Office, Wage and Hour Division, as the basis for a consent decree agreed to by members of the association in June 1942. Inspection difficulties in home work to which reference has already been made frequently compel such compromises in enforcing the Act's provisions in home work. The very nature of home work precludes the possibility of obtaining for the individual home worker minimum wages to which she is entitled under the Act and which can readily be guaranteed to the worker in the factory. It is clear, moreover, that since the rate in this case was constructed for the worker of average skill, it could not guarantee all home workers the minimum wage.<sup>281</sup> Of thirty home workers time-tested by the associ-

<sup>280</sup> R. 905, 906.

<sup>281</sup> Lande, R. 1666; See Price, R. 698-700.

<sup>282</sup> Mr. Landau testified that 90 to 95 percent of all veil dotting is done in New York City, with Chicago, Illinois, St. Louis, Missouri, and Los Angeles, California, accounting for the remainder. He stated that 26 firms were engaged in veil dotting in New York City, and that the 21 firms which were members of his association had a peak employment of from 1,000 to 1,500 home workers (R. 905-906, 915-918). Miss Anne Lande, Acting Supervising Inspector, New York Regional Office, Wage and Hour Division, testified, however, that the consent decrees entered in June 1942 against ten members of the association had been found on inspection in January and February 1942, to employ 112 home workers. One additional firm not a member of the association, which was also covered by the decree, employed 16 home workers. The other ten members of the association had, in January and February 1942, gone out of business (R. 1662-1664). One firm was found to be in compliance. In addition, the report of the Economics Branch showed that 17 concerns engaged in veil dotting received handbooks between April 1, 1939 and July 15, 1942. Only 185 home workers were engaged principally in miscellaneous embroidery operations, which as classified included veil dotting, in firms inspected between June 1, 1939 and July 1, 1942.

[f. l. 132] ation,<sup>282</sup> some actually received, at three cents per hundred dots, as little as 30 and 33 cents per hour.<sup>283</sup>

The piece rate fixed for veil dotting, considered in the light of the factors affecting home work earnings which are disclosed by the record, does not, in my judgment, afford a reasonable basis for believing that home workers can be guaranteed the minimum wages to which they are entitled by means of governmentally established piece rates. Even in veil dotting, the frequent lack of adequate working space [fol. 133] in the homes,<sup>284</sup> differences in productive ability, lack of employer supervision, participation by other persons in pick up and delivery of the work and in the actual performance of the work, and the intermittent character of home work preclude the possibility of drawing any conclusion from the evidence presented that piece rates can be satisfactorily established which will assure home workers the minimum. The multiplicity of styles and operations in other branches gives overwhelming support to this conclusion insofar as the Industry as a whole is concerned.

The record shows that piece rates have never been properly established to assure home workers the required minimum wage. Abraham Friedensohn, Public Art Embroidery, Inc., New York City, an employer witness on behalf of

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(Administrator's Exhibit 9, tables 8 and 9, pp. 14 and 15). The difference in the figures of home work employment in veil dotting given by Mr. Laudau and those indicated by the inspections of the New York Regional Office and by the Economics Branch report may be due to the fact that veil dotting is carried on, not only by embroidery contractors, but also by contractors who are regarded by the Division as being included in the Millinery and Women's Apparel Industries (Landau, R. 919). Upon the basis of all the evidence in the record on this matter, it would seem clear that the latter figures more closely approximate the actual number of home workers engaged in veil dotting in the Embroideries Industry than do the figures given by Mr. Laudau.

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<sup>283</sup> Lande, R. 1665.

<sup>284</sup> Jack Orloff, Orloff Sons, Inc., testified that the amount of working space per worker engaged in crochet beading in the factory is about 35 square feet (R. 1097).

the Pleaters, Stitchers and Embroiderers Association, Inc., testified on cross-examination that the entries made by employers in the home workers' handbooks did not reflect the actual amounts of time worked by the home workers on the various lots of work but were the amounts of time "allotted by the firm in accordance with its own test."<sup>285</sup> Mr. Friedensohn stated that the employer's estimate based upon the work of the sample makers "is the only gauge [fol. 134] that we have to guide ourselves by."<sup>286</sup> His testimony indicated that the same standard also governs the determination of whether the home worker is entitled to overtime, being based on whether the amount of work given to her during the week was estimated to require more than 40 hours of work by the home worker, not upon whether the home worker, in fact, worked more than 40 hours,<sup>287</sup> and that the employer had no way of knowing without actual visits to each home worker how many hours are actually worked, whether the home worker receives assistance from any other persons, or whether children perform any of the work.<sup>288</sup> This, Mr. Friedensohn indicated, was particu-

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<sup>285</sup> R. 1021. Mr. Friedensohn's contention that if the time allotted by the employer is not sufficient, the home workers will complain and may cease working for the employer (R. 1021-1022) is not borne out by the testimony of the home workers who stated that they were not asked upon delivery of the various lots of work how much working time each lot had required and that they themselves kept no record of the length of time required but assumed that the time fixed by the employer was correct. See, for example, the testimony of Mrs. Florence Acerbo, R. 849-950. Mrs. Jean Pelino, R. 888-892, and Mrs. Angelina Fugaro, R. 1184-1189; Friedensohn, R. 1002-1005, Mrs. Florence White, R. 1400, 1401, 1403-1405.

<sup>286</sup> R. 1024.

<sup>287</sup> R. 1024-1025, 1026.

<sup>288</sup> R. 1026-1028. Mr. Friedensohn described the sample maker whose work is the foundation of the piece rates as "a more accurate worker" rather than a better than average worker (R. 1030-1034, 1056). Mr. Friedensohn testified further that the sample hands themselves average between 62½ and 75 cents an hour on crochet beading and 50 cents an hour on hand embroidery (R. 1034-1036). Mr. Frieden-

larly true in situations where a contractor intervenes between the embroidery manufacturer and the home worker.<sup>289</sup>

Jack Orloff, Orloff Sons, Inc., New York, New York, another employer witness for the Pleaters, Stitchers and Embroiderers Association, Inc., described the method of determining piece rates in his establishment as follows:

[fol.135] \* \* \* the particular article would be timed by an average worker \* \* \* so that the workers—the work that is given at home is figured at a fair figure to the worker \* \* \* and the workers that do that work at home are average workers in my opinion.<sup>290</sup>

He testified further, in answer to questions:

Q. But the actual entry made [in the handbook] is not based upon the actual time it took her but only the estimated time assuming that she is an average worker, is that correct?

A. That is correct.

Q. And when any time is entered in the home worker's handbook for overtime, does that reflect the actual overtime spent by that worker in or home?

A. Well, it would be—

Q. Or is it also estimated?

A. It is estimated; it would be estimated.

Q. And not the actual time?

A. And not the actual time.<sup>291</sup>

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sohn's testimony indicated that the work done by his firm required skilled workers (R. 1031). Approximately 35 per cent of the work done by this firm in 1942 was in crochet beading while 15 per cent was in hand embroidery including bullion embroidery on naval officer insignia (R. 1055-1056, 1060).

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<sup>289</sup> R. 1039. The effect of the New York statute and the New Jersey Industrial Home Work Law (Division of Labor Standards Exhibit 11) is discussed *supra*, pp. 56-63.

<sup>290</sup> R. 1112.

<sup>291</sup> R. 1113. See also R. 1122-1123, 1157, 1158. Mr. Orloff testified that his crochet beading sample workers averaged between 50 and 60 cents an hour, depending upon the type

Mr. Orloff's testimony made clear that the wages paid are the same whether the home worker called for and delivered the work or it is sent to and brought back from her by other employees.<sup>292</sup> He claimed that when the home worker complained that the time set for a particular item was too [fol. 136] short considering the piece rate, adjustments would be made by paying additional amounts to the home worker, but that generally the home workers did the work in less time than that estimated on the basis of the sample maker.<sup>293</sup> The testimony of the home workers indicates, however, that the practice of making payments above the piece rates to slower workers is probably restricted to a very few firms in the Industry since the home workers themselves do not keep any close check on the time they work and are, in fact, unable to do so.<sup>294</sup>

There is evidence in the record<sup>295</sup> and administrative experience has shown that fear of loss of employment induces many home workers to refrain from reporting time worked on a particular piece of work in excess of the time which the employer indicates should be required.

Perry Meyerson, Treasurer, Meyerson Bros., Inc., New York, New York, another employer witness who appeared on behalf of the Pleaters, Stitchers and Embroiderers Asso-

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of work done, while his hand embroidery sample makers averaged between 40 and 50 cents an hour. One hand-sewing sample maker averaged 45 cents an hour. This latter worker was paid \$20 per week, whereas two years ago she was paid \$18 per week, although her rate per hour for time testing purposes had not been changed. R. 1116-1118.

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<sup>292</sup> R. 1120.

<sup>293</sup> R. 1157. See n. 285, *supra*. The employers contend that the sample maker is slower than the average home worker in order to assure a more perfect sample. Allowance is usually made for this extra time, however, in fixing the piece rates for the extra time expended by the sample maker.

<sup>294</sup> Acerbo, R. 949-950; Pelino, R. 882-892; Fugaro, R. 1184-1189.

<sup>295</sup> See Price, R. 700, 742-746.

ciation, Inc., testifying with respect to the fixing of piece rates,<sup>296</sup> explained the method used as follows:

• • • we try to work out inside, we have a piece made by one of our inside workers. We determine from that how long it takes to make and when a homemaker comes in we give her that work and tell her that that work should be produced in a certain stipulated time [fol. 137] and when she gets it she is advised that after making the first piece if she cannot make it not to go ahead with the lot.<sup>297</sup>

If the work were returned and—

we found that we could pay more for that work she would get paid more or it would be taken away from her and someone else would make it perhaps due to the fact that it is some kind of intricate design which she could not follow so fast. There are certain designs—one girl, for instance, in embroidery can turn out a piece in an hour and the next girl would take an hour and a half for the identical, the same piece of work.<sup>298</sup>

It appeared, however, that despite the differences in the nature of the work and in the degree of skill possessed by the home workers work was seldom, if ever, returned.<sup>299</sup>

An effort was made by one of the firms which appeared for the associations opposed to the restriction or prohibition of home work to have the handbooks show the actual amount of time worked by the home workers on each lot.<sup>300</sup> It was contended that the home workers of this concern were questioned each time work was returned by them as to the amounts of time they had spent on it, that when they did not complete the work in the required amount of time and would be compelled to work a longer period of time on the particular lot,<sup>301</sup> make up would be paid if the

<sup>296</sup> The same piece rates were paid to home workers as to inside workers (R. 1196).

<sup>297</sup> R. 1197.

<sup>298</sup> R. 1204.

<sup>299</sup> *Ibid.*

<sup>300</sup> See the testimony of Miss Jessie Geller, M. C. M. Pleating Company, New York, New York (R. 1234-1238, 1239).

<sup>301</sup> R. 1239-1240.

[fol. 138] time taken reduced the wage per hour below the minimum for the Industry.<sup>302</sup> Mrs. Jean Pelino, a hand embroidery home worker employed by the firm, testified that she averaged approximately 40 cents an hour.<sup>303</sup> She said that she was told when each lot of work was given out the amount of time it should require, based upon the sample maker's time.<sup>304</sup> Mrs. Pelino called for and delivered work three or four times a week, each trip averaging between three and four hours depending on the length of waiting time at the firm's office. Even assuming that she sometimes shopped while traveling to and from the firm's factory, it is probable that Mrs. Pelino's wages estimated on the basis of the total number of hours for which she should have been paid, were actually considerably below the applicable minimum of 37½ cents an hour.<sup>305</sup>

Further evidencing the fact that wages paid on a piece rate basis cannot be relied upon to assure home workers the applicable minimum *hourly* wage, Mrs. Pelino testified as follows:

Q. Assuming that you are given \* \* \* a bundle of work which consists of 12 dozen and each dozen is paid 40 cents, so the total amount to be paid for [fol. 139] that work would be 40 times 12—

A. (Interposing:) Right.

Q. \$4.08, [sic] is that correct?

A. Yes.

Q. Will you get any more for that bundle whether you have worked on it the day before and put in twelve hours or only if you put in eight hours?

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<sup>302</sup> R. 1247.

<sup>303</sup> R. 881.

<sup>304</sup> R. 888-889.

<sup>305</sup> R. 883-884, 901. See also Price, R. 702-703. Mrs. Pelino's earnings ranged, according to her testimony, between 40 cents an hour and 60 cents an hour "when I work real fast" (R. 881). Her handbook showed earnings of \$3.46 for 9 hours' work, or 38.44 cents per hour, and \$2.38 for six hours' work, or 39.67 cents per hour in two weeks in April and July, 1942 (R. 887-888). Her weekly earnings were considerably higher in other weeks but her hours for such weeks were not stated. Mrs. Pelino's handbook was not submitted in evidence (R. 901).

A. No, I wouldn't get any more.

Q. In other words, as long as you bring that work—

A. (Interposing:) You could make it in three hours, as long as you can make it, they don't care how long you take.

Q. And if it takes 16 hours work, other days before, you will get paid by the piece and not for the time it took you, is that correct?

A. Yes.<sup>306</sup>

Mrs. Pelino stated that she did not keep any written record of the amount of time she spent on a particular lot of work, because the time was recorded by her employer in her hand-book.<sup>307</sup> Although she always reported to the company the time she had spent—

they know the time \* \* \* I tell them my time, and it is about the same time as theirs \* \* \* I remember how long I took, and I tell them when I go back how long it took me to make the work \* \* \* I don't keep any records.<sup>308</sup>

It seems worthwhile to quote at length from the testimony of this witness on the practices followed by the firm when [fol. 140] the hourly earnings as determined upon the basis of the piece rates paid, fell below the legal minimum. In answer to questions by Counsel for the International Ladies' Garment Workers' Union, Mrs. Pelino testified:

Q. \* \* \* assume that a piece of work was given to you and the estimated time by the firm is two hours—

A. Yes.

Q. The price for that work would be set at 75 cents.

A. That is right.

Q. Now, we will assume that it took you instead of two hours, two and a half hours to do that piece of work, could you make 37½ cents on that particular piece of work?

<sup>306</sup> R. 891-892. The figure \$4.08 should, upon the basis of the question asked, have been given as \$4.80. The error was apparently one of transcription.

<sup>307</sup> R. 895, 902-903.

<sup>308</sup> R. 896-897; see also, in this connection, Weiss, R. 29.

A. No, on that I couldn't, but other work is better paid than that; so it makes up.

Q. It may average up?

A. That is right.

Q. But on that particular work, you couldn't make the 37½ cents an hour?

A. No.

Q. If you had reported that to the firm, that you cannot make the 37½ cents an hour quota or could such an occasion happen?

A. Yes, I did.

Q. Did they increase the price on that particular piece of work to you?

A. They did.

Q. They did?

A. Yes.

Q. And they have readjusted all the work that you have done on that garment?

A. Yes.

Q. So that when you said that the average of the price, then according to you, you didn't have to average up the price to get better work because they improved the price on that garment, is that correct?

A. That is right.

Q. Now, which one is correct, will they average the price or improve the price on that garment?

A. Well, sometimes the garments do take a little longer than others, and they raised the price a little way.

[fol. 141] Q. And on some garments they just let the price stand and they expect you to make it up with a better paying garment?

A. Yes.<sup>309</sup>

It is clear from Mrs. Pelino's testimony that even when the handbook entries are based on reports by the home workers and the piece rates paid taken together with the amount of working time shown to be spent per week indicate on the surface compliance with the minimum wages required by the Act, it is impossible to be certain that any home worker, particularly one who is paid wages at or

<sup>309</sup> R. 898-899.

near the minimum rate, is actually receiving the minimum. Although some employers have made determined efforts to fix piece rates designed to guarantee the minimum wage prescribed by the Act or applicable wage order, such efforts cannot be relied upon to accomplish their objective.

The problem which confronts the Wage and Hour Division in enforcing a minimum wage order for the Embroideries Industry with respect to home work is not alone the opportunities which home work affords to unscrupulous employers for evading the minimum wages required by the wage order or the unfair competitive advantages which they gain thereby, although the testimony of Wage and Hour Division inspectors indicates that situations of this kind are frequently encountered, but difficulties inherent in the uncontrolled nature of home work which make it impossible for well-intentioned employers as well as Government inspectors to obtain accurate knowledge as to how home workers spend their time, under what conditions they work and what assistance they obtain from other persons.<sup>310</sup> These various factors make clear that piece rates [fol. 142] which are determined on the basis of work performed under factory conditions cannot be relied upon to assure home workers the minimum wage prescribed for the Industry unless they are fixed at such a high level as to be unusable from a business point of view.

I conclude that mere regulation of industrial home work, including regulation of the record-keeping practices of employers or governmental establishment of piece rates will not be adequate to secure effective enforcement of the minimum wage order for the Embroideries Industry.

#### *D. Effect of Home Work on Minimum Wage Standards*

It was testified at the hearing that home work is cheaper in terms of labor costs than factory work and is used by employers to reduce production costs,<sup>311</sup> despite the advantages derived from the direct supervision over production, standardization and specialization which are possible in the factory. The evidence adduced at the hearing conclusively shows that large proportions of home work em-

<sup>310</sup> Cheesman, R. 126-133; Dahl, R. 352-354, 357-358; Price, R. 705; see also Beyer, R. 165-166.

<sup>311</sup> Papert, R. 1509-1510, 1535-1536; Weinberg, R. 4579.

ployees in the Embroideries Industry and in all of its branches are paid less than the applicable minimum.<sup>312</sup> It is apparent that if some employers are allowed to utilize home workers at subminimum wage scales, other employers compelled to pay a 40-cent minimum will be placed at a competitive disadvantage.

Representatives of the Pleaters, Stitchers and Embroiderers Association, Philadelphia, Pennsylvania,<sup>313</sup> appeared [fol. 143] at the hearing and requested that home work be abolished in the Embroideries Industry for the following reasons:

First, the difficulty of controlling hours and wages of the home workers; second, as a result of this lack of control, unfair competition, at least in the Philadelphia market, has arisen between the contractors of these home workers and the machine embroiderers, I mean those that do embroidery by machine in the factories . . . We . . . are of the opinion that since we service the dress manufacturing industry almost exclusively and since they have an order which will substantially abolish home work as of December 1, we feel as a matter of uniformity that the order by the Administrator should be the same.<sup>314</sup>

It was contended, however, by the associations and employers opposed to the restriction or prohibition of home work that home work should not be prohibited in crochet beading, hand embroidery, or bullion embroidery of military and naval insignia devices for officers since, allegedly, these operations are performed exclusively by home workers, and factory standards cannot, therefore, be endangered by the continuance of home work in these fields.<sup>315</sup>

<sup>312</sup> *Supra*, pp. 78-85.

<sup>313</sup> This association at the time of the hearing had 26 members employing 300 to 350 workers, and representing 90 percent of the embroidery firms in Philadelphia exclusive of those which employed home workers (R. 376).

<sup>314</sup> R. 369.

<sup>315</sup> See the brief filed in this proceeding by the Pleaters, Stitchers and Embroiderers Association, Inc., New York, New York, p. 6; Allan, R. 1660. See, however, Orloff, R.

The record does not support the premise on which this argument is founded, namely, that the operations in question are performed only by home workers. According to data compiled by the Economics Branch, 61 of the 102 firms whose home workers were found in inspections conducted [fol. 144] between June 1, 1939 and July 1, 1942, to be primarily engaged in crochet beading and hand embroidery had inside shops.<sup>316</sup> Of these 61 firms, 39, or 64.0 percent had crochet beading and hand embroidery performed as a method of production by both inside and plant workers, while only 19, or 31.1 percent, employed no inside workers on this type of work.<sup>317</sup> In interviews with 149 home workers who were principally engaged in crochet beading in establishments with inside shops, 127, or 85.2 percent, reported that ~~crochet~~ beading was also performed as a method of production by plant workers in such establishments, and only 11, or 7.4 percent, indicated that they were employed by firms which had no plant workers performing crochet beading as a method of production.<sup>318</sup> Of the 249 home workers primarily engaged in hand embroidery other than crochet beading, 137, or 55.1 percent, stated that hand embroidery was also performed by plant workers in the establishments for which they worked, while only 89, or

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1115-1116, 1576; Friedensohn, R. 994, 1006, 1026, 1069; Meyerson, R. 1202; Ganz, R. 1268; Geller, R. 1235; Alpine, R. 1252; Stern, R. 1261-1262; Sprung, R. 1443, 1456-1464, 1467-1468.

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<sup>316</sup> Administrator's Exhibit 9, table 11, p. 18. Forty-one plants, or 40.2 percent of the total had no inside plants.

<sup>317</sup> Administrator's Exhibit 9, table 11, p. 18. Whether the work was done in the plant as well as in the home workers' homes was not reported for 3, or 4.9 percent, of the firms. The term "method of production" does not encompass non-recurring operations such as are performed by sample makers. *Id.* p. 19.

<sup>318</sup> Administrator's Exhibit 9, table 12, p. 19. Whether crochet beading was performed in both the plant and in the home workers' homes was not reported in the case of 11, or 7.4 percent of the home workers.

35.7 percent, were employed by plants that had no plant workers performing this work as a method of production.<sup>319</sup> The testimony of home work employers who opposed the re-[fol. 145] striction or prohibition of home work also indicated that both inside and home workers were employed on crochet beading, hand embroidery, and bullion embroidery of military and naval insignia devices for officers.<sup>320</sup>

As shown by data compiled by the Economics Branch from inspection records of the Wage and Hour Division, 94.0 percent of the firms whose home workers were principally engaged in Schiffli and Swiss hand-machine embroidery had inside shops; 39.7 percent of these plants had such embroidery work done by both inside and home workers, while 55.5 percent had it done only by home workers. Corresponding percentages with respect to home workers primarily engaged in passementerie, lace cutting and miscellaneous embroidery operations were, respectively: 80.0, 45.0, and 55.0; 44.4, 75.0, and 25.0; and 60.0, 50.0, and 50.0. More than 71 percent of all of the firms inspected had inside shops. Operations performed by home workers were likewise performed by plant workers in 51.9 percent of the firms, while 44.3 percent of the firms had

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<sup>319</sup> Administrator's Exhibit 9, table 12, p. 19. Reports on whether hand embroidery other than crochet beading was done in both the plant and the home workers' homes were not obtained from 23, or 9.2 percent, of the home workers.

<sup>320</sup> The Vanguard Military Equipment Corporation was engaged exclusively in bullion embroidery and employed 19 factory and 32 home workers to perform this work. Sprung, R. 1443, 1456-1464, 1467-1468. The Worth Pleating Company of New York City up to 1940 and for seven years prior thereto employed 20 factory workers on hand embroidery and crochet beading. Alpine, R. 1252. Oscar Stern, Inc., also of New York City, employed 20 inside workers on hand embroidery and crochet beading in 1941 and 12 inside workers on these operations in 1942. Stern, R. 1262. Public Art Embroidery, New York City, during the 1942 season employed about 30 home workers on hand embroidery and crochet beading and 12 factory workers on crochet beading. Friedensohn, R. 1025, 1070.

these operations performed only by home workers.<sup>321</sup> Of the 226 home workers interviewed who were primarily engaged in Schiffli and Swiss hand-machine embroidery in establishments operating inside shops, 31.0 percent were [fol. 146] employed by concerns which had this work done in both inside shops and home workers' homes, while 64.6 percent were employed by firms which had this work done by home workers exclusively. For home workers principally engaged in passementerie, lace cutting and miscellaneous embroidery operations the corresponding percentages were, respectively: 47.5 and 50.5; 86.5 and 13.5; and 68.7 and 31.3.<sup>322</sup>

There are undoubtedly instances in which operations performed by home workers are not identical with operations performed in the factory. This does not eliminate competition between the products manufactured by the factory worker and the home worker since the very operations performed by the home worker may determine consumer preference and cause diversion of employment from the factory.

It is my finding, after due consideration of the low wage rates paid home workers and the competitive relationships among various types of the embroidery operations that it is necessary to provide terms and conditions with respect to the restriction of home work to carry out the purposes of the minimum wage order for the Industry, to prevent the circumvention or evasion thereof and to safeguard the 40-cent hourly minimum established therein.

In my Findings and Opinion in the Matter of Industrial Home Work in the Women's Apparel Industry I directed attention to the relationship between the Women's Apparel Industry and other industries. I pointed out that in

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<sup>321</sup> Administrator's Exhibit 9, table 11, p. 18.

<sup>322</sup> *Id.*, table 12, p. 19. According to the data compiled by the Economics Branch, 158 of the 222 firms in the Industry inspected between June 1, 1939 and July 1, 1942, had inside shops. At the time of inspection 2,406 home workers and 2,651 plant workers were employed by the 222 firms. The total peak season home work employment in these firms was 4,369. *Id.*, tables 5, 10 and 11, pp. 8, 17 and 18, respectively.

[fol. 147] making a finding for that Industry similar to the finding I have made for the Embroideries Industry—

full recognition is had of the fact that there may be home work employers in other industries whose activities affect the carrying out of the purposes of the 40 cent minimum wage order for the Women's Apparel Industry. The order issued pursuant to this opinion endeavors to meet the problem in the Women's Apparel Industry; other orders will be issued where necessary in other industries.<sup>323</sup>

The Embroideries Industry is one of the industries to which reference was made.

The report of the Economics Branch called attention to this matter. It stated:

When embroideries are produced by manufacturers of a garment, fabric or other article for use on such garment, fabric or other article, the employees, (including the home workers directly engaged by such manufacturers) are not covered by the embroideries industry definition. If, by way of illustration, a manufacturer of handkerchiefs or of infants' and children's outerwear performs embroidery on his own products, the embroidery work done by his employees is not covered by the embroideries industry definition but instead by the handkerchief or infants' and children's outerwear industry definition. If the embroidery, however, on these same articles is performed by a contractor of embroideries, the production is included under the embroideries industry definition. Thus, a substantial number of embroidery workers, and industrial home [fol. 148] workers in particular, are removed from the coverage of the embroideries industry wage order. The data in this report apply solely to home workers covered by the embroideries industry definition.

A considerable amount of embroidery has usually been done in the knitted outerwear and the women's apparel industries on knitted outerwear and on apparel

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<sup>323</sup> Findings and Opinion of the Administrator in the Matter of Industrial Home Work in the Women's Apparel Industry, July 8, 1942, p. 13.

for infants, children and women. To prevent the circumvention or evasion of the minimum wage orders issued for the knitted outerwear and women's apparel industries, the Administrator has already provided that no home work in those industries shall be done in or about a home except by former home workers who are unable to adjust themselves to factory work because of age or physical or mental disabilities, or because they are required to remain at home to care for invalids. Nevertheless, those knitted outerwear and women's apparel firms which formerly employed home workers will not be precluded by existing regulations from transferring their embroidery operations to embroideries firms employing home workers.<sup>324</sup>

The order issued pursuant to this opinion will eliminate any competitive disadvantage which may have been suffered by knitted outerwear, women's apparel and handkerchief manufacturers who perform embroidery on their own products, and who have been subject to regulations which prohibit industrial home work as such except in certain very limited conditions<sup>325</sup> while embroidery contractors have been subject to no Federal restrictions on employment of [fol. 149] home workers. It will tend, in accordance with the intention expressed in my opinion on industrial home work in the Women's Apparel Industry, to stabilize competitive relationships between concerns in the Embroideries Industry and in the Women's Apparel, Knitted Outerwear and Handkerchief Manufacturing Industries.

## II. Possibility of Adjustment to Factory Production and Employment If Home Work Is Prohibited in the Embroideries Industry

The ability of employers and home workers engaged in home work production in the Embroideries Industry to adjust to the prohibition of home work was considered at

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<sup>324</sup> Administrator's Exhibit 9, p. 1. See also Weiss, R. 20-22; Beyer, R. 171.

<sup>325</sup> Title 29, c. V, Parts 617 and 617.100, 605 and 605.00, 628 and 628.100, Code of Federal Regulations.

length at the hearing.<sup>326</sup> Reports on experience with prohibition of home work under the National Industrial Recovery Act and various State laws were presented in evidence. I have considered all the evidence relating to adjustment to the factory system of manufacture and find that this adjustment can reasonably be made without undue hardship upon home workers or home work employers.

After home work was prohibited in the men's neckwear and men's clothing industries by regulations issued under the national Industrial Recovery Act,<sup>327</sup> the Children's Bureau of the United States Department of Labor made studies of the effects of these regulations.<sup>328</sup> Seventy-five firms and 251 families were investigated.<sup>329</sup> Only one firm discontinued the line of goods on which home workers were [fol. 150] employed as a result of the prohibition of home work; only one went out of business; and only one employed home workers under special handicapped workers certificates.<sup>330</sup> The remainder transferred a substantial part of their home workers to the factory. Of the 3,135 persons who worked at home prior to prohibition of home work, 2,588, or 82 percent, were employed in the factory after abolition of home work.<sup>331</sup> Although many firms continued home work in violation of the codes and this factor is not accurately shown by the data,<sup>332</sup> nonetheless the study does accurately reflect the possibilities of transferring home work to the factory.

In the men's clothing industry, 94 percent of the home workers transferred to factory operation, and practically no complaints of violations of the home work prohibition were received.<sup>333</sup> Hand operations were changed to ma-

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<sup>326</sup> Administrator's Exhibit 9, pp. 22-25; Beyer, R. 166, 167, 172; 175, 182-183; Price, R. 705-707; Ackroyd, R. 89-90; Cheesman, R. 133; Cherashore, R. 368-369; Nachman, R. 370-373.

<sup>327</sup> Act of June 16, 1933, c. 90, 48 Stat. 195.

<sup>328</sup> Division of Labor Standards Exhibit 5.

<sup>329</sup> *Id.* at 9.

<sup>330</sup> *Id.* at 11.

<sup>331</sup> *Id.* at 12.

<sup>332</sup> *Id.* at 13.

<sup>333</sup> *Id.* at 15.

chine operations wherever possible, but in many instances it was impossible to eliminate the hand operations. In these instances, the hand operations were broken down into simple repetitive processes. These methods, in addition to increased specialization, quickened production and offset higher labor and overhead costs.<sup>334</sup> In the men's neckwear industry, however, little attempt was made to change the process when brought into the factory.<sup>335</sup>

The survey conducted by the Children's Bureau showed that home workers who shifted to the factory found little trouble in self-adjustment irrespective of age, and output [fol. 151] improved in quantity and quality. Hourly earnings increased as much as 200 percent.<sup>336</sup> Of 505 families interviewed, the members of not more than 73 found employment outside the home impossible. Members of 241 families obtained factory employment. Satisfactory arrangements for home management and care of dependents and small children were possible in all but 22 cases. Of home workers taken into the factory, only 24 terminated their employment—5 because they were needed at home and 19 because they were unable to adjust satisfactorily to factory employment.<sup>337</sup> The report of the Children's Bureau stated that it should have been possible to compensate for loss of home work by other employment in the case of 72 percent of the families in which no home workers were taken into the factory. In only 4 percent of the 505 families did the loss of home work earnings cause the family to apply for relief.<sup>338</sup>

Similar experience has been reported in the administration of laws restricting the employment of industrial home workers in the States of New Jersey, Rhode Island, and New York.

The State of New Jersey in its Industrial Home work Law,<sup>339</sup> which became effective October 26, 1941, prohibited

<sup>334</sup> Division of Labor Standards Exhibit 5, pp. 14-15.

<sup>335</sup> *Id.* at 16.

<sup>336</sup> *Id.* at 16-21.

<sup>337</sup> *Id.* at 22, 24.

<sup>338</sup> Division of Labor Standards Exhibit 2, pp. 24-25.

<sup>339</sup> Laws of New Jersey, 1941, Chapter 308, July 28, 1941 (Division of Labor Standards Exhibit 11). See n. 154, *supra*, p. 56.

all home work on articles of infants' and children's wearing apparel and, in the case of all other products, limited home workers' employment to not more than one home worker for every three inside workers engaged in similar work. The effect of this law was the automatic elimination of all home work on articles of infants' and children's wearing [fol. 152] apparel. With few exceptions, most of the home work performed on infants' and children's wear was hand embroidery. With respect to other industries, the Economics Branch reported:

A marked reduction in the number of home workers occurred in all other industries. Some manufacturers who employed only a few home workers discontinued home work rather than pay the \$50 license fee; others decided that they did not want to be burdened with state regulations in addition to the federal requirements. Where the home workers exceeded the stipulated rates of one-third the number of plant workers, the number of home workers had to be reduced. Some home work distributors established shops, hired inside workers and continued to use a limited number of home workers. More than half of the plant workers employed by the 38 firms which directly employed home workers performed operations similar to those performed by the home workers.<sup>340</sup>

Roland G. Cheesman, Supervising Inspector of the Newark, New Jersey office, Wage and Hour Division, testified that a survey of 15 firms in the Embroideries Industry in New Jersey showed that the total number of home workers employed by these firms had been reduced from 126 to 29 in order to comply with the New Jersey law and regulations and that in most instances the work formerly performed by home workers was being done in the plant. Only one of the 15 employers contacted claimed that this change in his operations had been a particular hardship to him.<sup>341</sup> The results of the New Jersey law have clearly been a marked reduction in the number of home workers and the [fol. 153] bringing of many home workers into the factory. Both employers and home workers have made the necessary adjustments to its requirements.

<sup>340</sup> Administrator's Exhibit 9, p. 24.

<sup>341</sup> R. 133-134.

The Rhode Island Department of Labor in 1938 issued a wage order establishing minimum wages for women and minors in the wearing apparel and accessories industry. To effectuate this minimum, the order also provided for prohibition of industrial home work. The order covered "embroidery operations" performed on underwear, handkerchiefs, infants' and children's clothing, women's dresses and gift novelties. Manufacturers in the State experienced no difficulty in bringing home workers into the factories, and the Industry has continued to grow in the State.<sup>342</sup>

The New York Department of Labor concluded after a study of the effects of prohibition of industrial home work in the artificial flower and feather industry pursuant to New York law that adjustments to prohibition of home work can be made.<sup>343</sup>

This was also the conclusion of Mrs. Clara M. Beyer, Assistant Director, Division of Labor Standards, United States Department of Labor.<sup>344</sup>

It has been contended that home workers in the Embroideries Industry are unwilling or unable to take factory employment and that their labor will be lost to the Industry if home work is prohibited at a time when there is a serious shortage of both factory and home workers.<sup>345</sup> State-[fol. 154] ments of home workers as to their unwillingness or inability to work in a factory,<sup>346</sup> and evidence showing

<sup>342</sup> Ackroyd, R. 89-90, 114, 124-125.

<sup>343</sup> Papert, R. 1487, 1518-1521; New York Department of Labor Exhibit 5.

<sup>344</sup> R. 172-177; see also Hinrichs, R. 47-48.

<sup>345</sup> See the briefs filed on behalf of Manufacturers of Military and Naval Insignia Devices, p. 35; National Hand Embroiderers and Novelty Manufacturers Association and Associated Manufacturers of Tubular Pippings and Trimmings, Inc., p. 12; and Pleaters, Stitchers and Embroiderers Association, Inc., pp. 12-14.

<sup>346</sup> Franks, R. 772; Gagliardi, R. 814-815; Gangemi, R. 833-834; Locascio, R. 860; Pelino, R. 880; Maretzo, R. 976; Fugaro, R. 1172-1173; LaGalente, R. 1277; Panzeca, R. 1315; Pillischer, R. 1329-1330. Compare the testimony of Mrs. Florence Acerbo, R. 942, and Mrs. Mary Comenzo, R. 1300.

the efforts of concerns in the Industry to obtain workers<sup>347</sup> were included in the record.

The Economics Branch summarized the responses given by home workers in the course of inspections by the Division to the question whether they would accept factory employment if available. As pointed out, however, in its report, the question—

relates to a hypothetical situation, the full content of which is not readily understood by the home worker, and does not, of course, give any clear indication of the home workers' possible reactions if home work were not available.<sup>348</sup>

Even in answer to such a hypothetical question, about 23 per cent of the 1,046 home workers interviewed expressed a willingness to accept factory employment, while 52 per cent stated that they would not accept such employment, assigning various reasons such as household duties, necessity of caring for children or invalids, ill health, age, and [fol. 155] personal preference. A large number of the home workers, 25 per cent, did not give a reply to the question.<sup>349</sup>

Variation of the form of question put to the home workers brought different results, as shown by the testimony of

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<sup>347</sup> Friedensohn R. 995-996, 1006-1008; Orloff, R. 1095-1096, 1101-1103; Meyerson, R. 1196, 1198-1199; Geller, R. 1235-1238; Alpine, R. 1249-1251; Stern, R. 1262-1263; Ganz, R. 1269-1270; Pleaters, Stitchers and Embroiderers Association Exhibits 1, 2, 4, 5, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17.

<sup>348</sup> Administrator' Exhibit 9, p. 16.

<sup>349</sup> *Ibid.* See also table 13, p. 20. Of the 133 home workers who had had previous factory experience, 63, or 47.4 per cent, said they would be willing to accept factory employment, while 60, or 45.1 per cent, said they would not. When these figures and percentages are compared with those for the 608 home workers who had had no previous factory experience, it seems clear that lack of familiarity with factory work is probably a very significant factor in determining the home workers' willingness to accept factory employment. Of those with no previous factory experience, 163, or 26.8 per cent, expressed willingness to take factory employment, while 421, or 69.3 per cent, said they would not.

Miss Branson Price, Inspector, New York Regional Office, Wage and Hour Division.<sup>350</sup> She testified:

For the past season or two there has been a great vogue for embroideries, and particularly for crochet beading. During the course of inspections in the embroideries industry, employers have maintained that they had great difficulty in obtaining a sufficient number of crochet beaders to meet the demand, and that the vast majority of crochet beaders will not accept factory employment. In order to determine the validity of these claims it was decided by the Homework Unit of the New York Regional Office of the Wage and Hour Division to interview a number of homeworkers in the embroideries industry whose operations were confined to crochet beading. Accordingly, letters were addressed to 250 homeworkers listed in regional case files of firms which inspection revealed had employed crochet beading homeworkers • • • <sup>351</sup>

[fol. 156] Interviews were had with 128 home workers, of whom 88 were at the time engaged in crochet beading.<sup>352</sup> The latter were asked three questions: (1) whether they would accept factory work if a job were available; (2) whether they would accept a factory job if available and if no home work were available; and (3) if they were unwilling to work in a factory, their reasons therefor. Although only 22 answered the first question affirmatively, 37 gave an affirmative reply to the second. Thirty-one said they were unwilling in any case to work in a factory.<sup>353</sup>

<sup>350</sup> R. 705-707.

<sup>351</sup> R. 706.

<sup>352</sup> *Ibid.* Twenty-three of those interviewed were employed at inside work at the time of the interview, although they had formerly worked at home (R. 708).

<sup>353</sup> R. 707. Eleven of the 31 home workers unwilling to go into a factory gave reasons which would entitle them to certificates permitting them to engage in home work in industries for which prohibitory orders have thus far been issued.

The 88 home workers were currently employed by 29 concerns but had within the past two seasons worked for 18 additional firms.

Miss Price also testified that during the previous year she had questioned 216 home workers in the Embroideries Industry as to whether they would work in a factory; 79 had answered affirmatively and 137 had answered negatively. Following October 7, 1942, she stated, she had changed the form of the question by inquiring whether the home worker would accept factory employment if available and "if there were no homework." Thirty-two of the 50 home workers questioned answered affirmatively, and only 18 replied in the negative.<sup>354</sup>

Miss Price testified further that in the case of nine embroidery firms which she had inspected and which had dis-[fol. 157] continued home work, 156 employees were performing operations formerly done by 241 home workers. Ninety-seven employees were former home workers.<sup>355</sup>

Of the home workers whose testimony purported to show that they would not work in a factory if no home work were available, ten assigned as the reason for their statements that the care of their children would not permit them to take factory work;<sup>356</sup> one had aged parents living with her;<sup>357</sup> one expressed a disinclination to factory work;<sup>358</sup> one stated that she was ill;<sup>359</sup> and one had an invalid husband.<sup>360</sup> Two of the home workers indicated that it was quite possible they would take factory employment if home work were prohibited.<sup>361</sup> In the light of the reasons

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Sixteen supplemented their income from crochet beading home work by performing other work in off seasons, principally hand embroidery. Some were engaged in both hand embroidery and crochet beading in the same workweek during the crochet beading season.

<sup>354</sup> R. 705-706.

<sup>355</sup> R. 705.

<sup>356</sup> Frank, R. 772; Locascio, R. 860; Pelino, R. 880; Maretzo, R. 976; Fugaro, R. 1172; LaGalante, R. 1278; Panzeca, R. 1315; Boarman, R. 1419; Johnson, R. 1427.

<sup>357</sup> Gagliardi, R. 816.

<sup>358</sup> Gangemi, R. 834.

<sup>359</sup> Pillfischer, R. 1329.

<sup>360</sup> White, R. 1398.

<sup>361</sup> Acerbo, R. 942; Comenzo, R. 1300.

given by the home workers for their asserted inability to accept factory employment and their domestic circumstances, as shown by their testimony, I am unable to accept their testimony as furnishing a sound basis for predicating their actual conduct when faced with actual prohibition of home work. This conclusion is clearly supported by the evidence in the record that adjustments have been made satisfactorily wherever actual abandonment has occurred.<sup>362</sup>

Employers testified at the hearing that they had had difficulty in obtaining a sufficient number of workers ex-[fol. 158] perienced in crochet beading, hand embroidery and military embroidery and that prohibition of home work would make the carrying on of a major portion of their operations virtually impossible. They stated that they were unable to induce their home workers to accept factory employment.<sup>363</sup>

<sup>362</sup> Hinrichs, R. 48, 55-58; Beyer, R. 172-175.

<sup>363</sup> Friedensohn, R. 995-993; Orloff, R. 1095-1096; Sprung, R. 1443-1446; see also the briefs submitted on behalf of the Pleaters, Stitchers and Embroiderers Association, Inc., New York, New York, pp. 12-16; the National Hand Embroiderers and Novelty Manufacturers Association and Associated Manufacturers of Tubular Pippings and Trimmings, Inc., New York, New York, pp. 4-6; and Manufacturers of Military and Naval Insignia Devices, pp. 35-38. Similar contentions were advanced in letters to me from the Pleaters, Sticheers and Embroiderers Association, Inc., New York, New York, dated October 3, 1942, April 21, 1943, and June 7, 1943.

On May 5, 1943, the Pleaters, Stitchers and Embroidery Manufacturers Association, Inc., of Chicago, Illinois, submitted its brief on the matters at issue in this proceeding. Representatives of this association, namely, Martin Somers, President, and Irwin H. Weiss, Executive Director and Counsel, were present during the first two days of the hearing but were unable to attend the entire hearing. This association advanced arguments in opposition to the prohibition of home work similar to those urged by the other embroidery associations and manufacturers. It contended that its members were already operating under restrictions imposed by orders of the War Production Board and that farther limitations on their ability to serve the dress industry would compel most of them to close their places of

[fol. 159] The evidence shows that the Pleaters, Stitchers and Embroiderers Association, New York, New York, was at the time of the hearing composed of approximately 320 members of whom not more than 70 utilized homeworkers.<sup>364</sup>

business. It contended further that they were unable to obtain, either through their own efforts or through the union, additional factory workers for hand embroidery or crochet beading; that home workers "are not individuals who can adapt themselves to defense or war work" and that "it is impossible to obtain new workers inasmuch as we cannot assure them of work throughout the year." The association stated that home workers in the Chicago area were earning the minimum prescribed by the Fair Labor Standards Act, and it referred to the difficulties involved in training competent workers for crochet beading and hand embroidery. The association concluded, "If home work were prohibited the inability of our manufacturers to obtain workers during the present labor shortage in Chicago, due to the war production coupled with the length of time it would take to train new workers (if by any stretch of the imagination they could be obtained) would surely compel a majority of our manufacturers to close their doors." Although the brief submitted by the Pleaters, Stitchers and Embroidery Manufacturers Association of Chicago and the letters of the Pleaters, Stitchers and Embroiderers Association, Inc., referred to above, are not strictly regarded parts of the record in this proceeding since the former was filed after the final date for filing briefs (7 F. R. 11029) and the latter were not made a part of the record at the hearing, the contentions which are advanced are similar to those which were urged at the hearing by the embroidery associations and manufacturers who appeared in opposition to the prohibition of home work. I have carefully considered these contentions in the light of the evidence thereon adduced at the hearing, and I find that they are without foundation.

<sup>364</sup> Orloff, R. 1108-1109. The association sponsored the prohibition of industrial home work in the code for the Pleating, Stitching and Bonnaz and Hand Embroidery Industry, Code No. 276, under the National Industrial Recovery Act. In its contracts with the International

It would appear, therefore, that for the great majority of the members of this association the prohibition of industrial home work cannot have any harmful effects. Assuming that the members of the association who testified at the hearing are representative of all members who employ home workers,<sup>365</sup> it is also clear that there are factors in [fol. 160] their operations which will tend to mitigate any adverse effects of a prohibition of industrial home work. While hand embroidery, including crochet beading, accounts for a substantial part of their business, it is not in most cases a major part thereof.<sup>366</sup> The major part of the work performed by these concerns consists of the same types of machine embroidery that are performed by concerns which do not utilize home workers.<sup>367</sup> Furthermore, since hand embroidery and crochet beading are commonly used to add further embellishment to machine embroidered items,<sup>368</sup> concerns which are now having such hand work done in homes will be strongly impelled to find means of having this work performed in the factory. I find that neither the association as a whole, nor its members who employ home

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Ladies' Garment Workers' Union, the association continued to assert its opposition in principle to industrial home work. It does not appear that any formal action to modify the association's position on the prohibition of home work was adopted until November 12, 1942, 10 days after the commencement of the hearing in this proceeding, when its Board of Directors adopted a resolution expressing interest in the matter. Orloff, R. 1163-1167, 1169; Pleaters, Stitchers and Embroiderers Association Exhibit 21.

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<sup>365</sup> It was stipulated that additional employers who were named for the record were "prepared to testify to substantially the same matters as other employers of home-workers have testified to date at this hearing" and that "on cross examination the answers to questions would elicit the same information and the same answers as have been elicited to this date from employers on cross-examination" (R. 1265-1266).

<sup>366</sup> Friedensohn, R. 1055; Orloff, R. 1100; Meyerson, R. 1195; Geller, R. 1241; Alpine, R. 1261-1265.

<sup>367</sup> Orloff, R. 1094-1095.

<sup>368</sup> See Orloff, R. 1096.

workers, will, in the light of conditions in the Embroideries Industry as disclosed by the record, have any great difficulty in adjusting their operations to the prohibition of industrial home work, nor will they suffer any serious competitive disadvantage therefrom.

The evidence does not show the number of members of the National Hand Embroiderers and Novelty Manufacturers Association or of the Associated Manufacturers of Tubular Pippings and Trimmings, Inc., who utilize home workers.<sup>369</sup> The evidence is particularly vague concerning [fol. 161] the operations conducted by members of the former association.<sup>370</sup> Upon the evidence in the record, I find that the prohibition of industrial home work will not involve for the members of these associations such disruption of their operations as will jeopardize their ability to continue in business or subject them to any significant competitive disadvantage.

It was testified that concerns engaged in bullion embroidery of military and naval insignia devices for officers' uniforms were also engaged in other types of embroidery, including both machine and hand embroidery.<sup>371</sup> The adaptability to changes in operations which characterizes the Embroideries Industry as well as all other apparel industries, can be counted upon to effect whatever adjustments will be required by the prohibition of industrial home work. Since these concerns produce nearly all of the bullion embroidery for military and naval insignia devices,<sup>372</sup> it is clear that they will not be subjected to any competitive disadvantage by the prohibition of industrial home work. I

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<sup>369</sup> Friedman, R. 1342-1350, 1362-1363. The Associated Manufacturers of Tubular Pippings and Trimmings, Inc., had a membership of approximately 35 concerns at the time of the hearing. It appears that this association had, in its contract with Local 66 of the International Ladies' Garment Workers' Union, agreed in principle to the abolition of home work (R. 1362, 1363). The membership of the National Hand Embroidery and Novelty Manufacturers Association was not stated for the record.

<sup>370</sup> See R. 1346-1350.

<sup>371</sup> Sprung, R. 1456-1463.

<sup>372</sup> Sprung, R. 1441, 1442.

find that these concerns will thereby be caused no undue hardship nor any substantial competitive disadvantages.

The evidence which was offered by the embroidery associations and manufacturers opposing the prohibition of home work to show that employers have had difficulty in securing a sufficient number of employees fails to demonstrate that any insuperable obstacles will be encountered by employers in adjusting their operations. Crochet beading, hand embroidery and military embroidery were markedly stimulated in 1942 by orders of the War Production Board which, by limiting the quantity and types of materials available for use in the production of garments, induced dress and other apparel manufacturers to rely more heavily than usual upon crochet beading and hand embroidery for the embellishment of their products, and by the increased requirements of the armed forces for appropriate insignia for officers' uniforms.<sup>373</sup> Firms which formerly performed pleating, tucking and shirring as their major operations have recently undertaken crochet beading, hand embroidery and military embroidery for the first time. The demand for workers experienced in these types of embroidery on both the part of firms newly engaged in this work and concerns which were already producing these types of embroidery was tremendously increased in 1942.<sup>374</sup>

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<sup>373</sup> Style changes have always been a significant factor in the Industry since it is largely integrated with the dress and other apparel industries (Administrator's Exhibit 9, p. 10). Seasonality has also been an important aspect of operations in certain branches. For example, crochet beading is normally at its peak from the latter part of July through October. Some small amounts of crochet beading are done in the early spring. Hand embroidery normally reaches its peak in March. Meyerson, R. 1200-1201, 1217. See also Beyer, R. 177; Price, R. 706; Friedensohn, R. 995-996; Orloff, R. 1095-1096, 1140-1141; Sprung, R. 1443-1446; Weinberg, R. 1612.

<sup>374</sup> Julius Ganz testified that his concern had not done any crochet beading work until about 1940 and that hand work was an innovation for his concern (R. 1273). Abraham Friedensohn and Jack Orloff stated that they were for the first time attempting bullion embroidery of military and naval insignia devices for officers' uniforms although em-

The demand for new workers was not, however, limited to factory workers but applied to home workers as well.<sup>375</sup> An analysis of 651 advertisements for embroidery workers which were published on behalf of 123 firms in a New York City newspaper in the month of August 1942, showed that 312, or nearly half, called for workers to do crochet bead-[fol. 163] ing.<sup>376</sup> Home workers were sought in 77, and factory workers in 91 advertisements for crochet-beaders.<sup>377</sup> Home workers were sought in a majority of the advertisements for other types of embroidery workers which specified whether home or factory workers were wanted.<sup>378</sup> In the case of advertisements submitted for the record by the Pleaters, Stitchers and Embroiderers Association, Inc., of New York City, 93 referred exclusively to crochet beading, 10 to hand embroidery, 26 to crochet beading and hand embroidery, 25 to crochet beading and spangling, 7 to hand embroidery and other types of embroidery, and a total of 5 to bullion embroidery, applique, fagotting and stamping.<sup>379</sup> The overwhelming majority of the advertisements

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broiderers had often done bullion work for use on non-military apparel (R. 1059-1063, 1086-1091, 1124-1152). See also Friedensohn, R. 1044-1046; Meyerson, R. 1195, 1199-1201, 1204-1205, 1208; Geller, R. 1238; Alpine, R. 1249-1260; Stern, R. 1261-1265.

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<sup>375</sup> Friedensohn, R. 1087; International Ladies' Garment Workers' Union Exhibit 10; Pleaters, Stitchers and Embroiderers Association Exhibits 1, 2, 4, 5, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17.

<sup>376</sup> International Ladies' Garment Workers' Union Exhibit 10.

<sup>377</sup> *Ibid.* The remaining 144 advertisements did not specify whether the workers were for home or for factory work.

<sup>378</sup> *Ibid.* Some of the advertisements sought workers for more than one type of embroidery. Hand embroiders were sought in 84 advertisements, spanglers in 54, smockers in 38, workers to do fagotting and applique work in 30 each, pattern makers, stampers and perforators in 29, frame workers in 25, and hand sewers in 7. The type of embroidery work to be done was not specified in 216 advertisements.

<sup>379</sup> Pleaters, Stitchers and Embroiderers Association Exhibits 1, 2, 4, 5, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17.

sought both factory and home workers. There were 141 such advertisements as compared with only 8 for factory workers exclusively, 5 for home workers exclusively and 14 not specified. In the case of 76 of the advertisements the workers sought were specified as "experienced"; 22 of the advertisements sought sample hands.<sup>380</sup>

[fol. 164] The extent of advertising for workers does not in itself constitute an exact indication of a labor shortage. Even in an abundant labor market it is frequently difficult to secure certain skilled workers.<sup>381</sup> Embroidery concerns which were represented at the hearing had advertised for workers to do crochet beading for hand-embroidery in previous years as well as in 1942.<sup>382</sup>

Furthermore, in evaluating the possibility of adjustment to the prohibition of industrial home work—

it should be borne in mind that relatively full-time factory employment during the peak season of a substantial portion of a home worker group may be sufficient to produce the volume of work formerly produced by a larger number of industrial home workers since most of the latter group rarely work on a full-time basis even during the busy season.<sup>383</sup>

A. F. Hinrichs, Acting Commissioner of Labor Statistics, Bureau of Labor Statistics, United States Department of Labor, testified that there was no general shortage of labor in the Embroideries Industry.<sup>384</sup> Dr. Hinrichs stated that—

The efficient utilization of the services of the individual home worker will be promoted by encouraging those individuals to enter factory employment. The prohi-

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<sup>380</sup> Pleaters, Stitchers and Embroiderers Association Exhibits 1, 2, 4, 5, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17. Three of the advertisements also sought "persons with following to give out work."

<sup>381</sup> Beyer, R. 177.

<sup>382</sup> Friedensohn, R. 1006, 1083; Orloff, R. 1120-1121; Meyerson R. 1201; Alpine, R. 1252.

<sup>383</sup> Weiss, R. 28.

<sup>384</sup> Hinrichs, R. 42-67; see also Weinberg, R. 1598-1599; 1611-1614.

bition of industrial home work tends to accomplish this. \* \* \* It may be pointed out that in order to utilize [fol. 165] the services of all of these people in factory employment, or a high proportion of them in factory employment, additional provisions may have to be made for the day care of children. Facilities to make possible the labor of women in the factories are being expanded at the present time. On the whole, factory work is more efficient than home work. There can be better supervising, better provision for machine equipment, better subdivision of labor and a more complete exploitation of the time available for work. Hence, the prohibition of industrial home work tends to increase the amount of essential production that can be accomplished by any given number of women. In such a labor market as will exist in the foreseeable future in New York City the prohibition of industrial home work may actually tend to relieve a labor shortage if one ever develops.<sup>385</sup>

These views were supported by testimony that concerns which had formerly utilized home workers found that the work could be performed in the factory far more efficiently, with fewer workers and with no deterioration in quality.<sup>386</sup>

It was contended on behalf of a large concern engaged in the creation and stamping of designs on fabric for art needlework that prohibition of home work in the Embroideries Industry would seriously interfere with the conduct of its business.<sup>387</sup> The concern in question will, however, be affected only indirectly, if at all, by a prohibition of industrial home work in the Embroideries Industry, since the embroidery of the designs is done by embroidery manufacturers or contractors to whom the designs are distributed and who employ home workers to produce embroidered models for use in the sale of the stamped art goods by department stores and other selling establish-

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<sup>385</sup> R. 47-48.

<sup>386</sup> Nachman, R. 370-373; see also Dahl, R. 358-359; Price R. 705. The testimony of these witnesses also indicates that many former home workers were brought into the factory.

<sup>387</sup> See the testimony of Joseph L. McCormack, Counsel, Fixler Bros., Chicago, Illinois, R. 926-940.

ments.<sup>388</sup> No home workers are employed directly by the concern.<sup>389</sup> The possibilities of adjustment to the prohibition of home work which are available to embroidery manufacturers and contractors generally will be available to the firms which embroider models for concerns of this type. Furthermore, it is difficult to believe that the use of models to advertise the designs is as essential to the carrying on of the business of these concerns as has been urged.<sup>390</sup> I find that the contention of the stamped art goods concerns is without sufficient foundation to justify the threat to the minimum wage which a continuation of home work would permit.

There was testimony at the hearing that the elimination of home work would be clearly desirable as a matter of business efficiency if it can be done without disturbing major operations in the Industry,<sup>391</sup> and that, although some firms might have some difficulty in finding working space to accommodate home workers brought into the factory, some firms had ample facilities for this purpose.<sup>392</sup> I have already found that prohibition of home work will not involve any substantial difficulties in the Industry.

Although it has been argued that prohibition of industrial home work in the Embroideries Industry will mean the elimination of certain types of embroidery, such as crochet beading, hand embroidery, and bullion embroidery of military and naval insignia, the evidence in the record not only does not support any such contention, but indicates rather that production of these types of embroidery may be stimulated and increased. Prohibition of home work will not prohibit any type of work or occupation but will merely compel the transfer of work and occupations formerly carried on in the homes to the factory where the workers may be adequately supervised and their payment in accordance with the minimum wage order for the In-

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<sup>388</sup> McCormack, R. 926-927, 930-933, 937-938. Mr. McCormack testified that about 500 women were engaged in embroidery home work on models of stamped art goods in and around Chicago.

<sup>389</sup> McCormack, R. 931.

<sup>390</sup> McCormack, R. 928.

<sup>391</sup> Friedensohn, R. 991; Orloff, R. 1097; Meyerson, R. 1196.

<sup>392</sup> Meyerson, R. 1196.

dustry guaranteed. The possibilities of adjustment to a prohibition of home work which are disclosed by the record furnish ample assurance that no substantial curtailment of operation will result. All of the operations in question are performed in the factory as well as in the home. It cannot reasonably be argued, therefore, that any prohibition of restriction of crochet beading, hand embroidery, or bullion embroidery of military and naval insignia will result from the prohibition of industrial home work in the Industry.

I conclude, upon the evidence in the record, that reasonable adjustment can be made to a prohibition of industrial home work in the Embroideries Industry.

I also conclude that the need for efficient utilization of labor in time of war makes it especially advisable that the wasteful methods of industrial home work be eliminated.

### III. Persons Unable to Adjust to Factory Work

In order to avoid hardship which may be caused home-workers who are unable to adjust or remove themselves to factories, I have determined it advisable to include a provision permitting the employment in homes of persons certified as unable to adjust themselves to factory work because of age or physical or mental disability or unable to leave home because their presence is required to care [fol. 168] for an invalid in the home and who are certified either as being employed under the supervision of a sheltered workshop or State vocational rehabilitation agency or as having been employed in industrial home work in the Embroideries Industry prior to November 2, 1942.<sup>393</sup> Because relatively few home workers will be eligible to continue home work under this exception, in addition to the fact that some of these will be working under the supervision of governmental or non-profit agencies, I find that no threat to the standards of the wage order will be involved in providing this exception. This exception is similar to the provision made by the President in Executive Order

<sup>393</sup> I have also deemed it advisable to provide that the requirement of previous industrial home work employment in the Embroideries Industry shall not be applied when the application of this requirement results in unusual hardship to the individual home worker.

of May 1934 permitting exceptions to the prohibitions of home work under the National Industrial Recovery Act, and to those contained in administrative provisions of State prohibiting orders and in the wage orders, as amended, prohibiting home work in the Jewelry Manufacturing Industry, Knitted Outerwear Industry, Women's Apparel Industry, Button and Buckle Manufacturing Industry, Gloves and Mittens Industry and Handkerchief Manufacturing Industry.

#### IV. Conclusion

Upon the entire record, I find that it is necessary, in order to carry out the purposes of the minimum wage order for the Embroideries Industry, to prevent the circumvention or evasion thereof, and to safeguard the minimum wage rate prescribed therein, to include terms and conditions in the order which shall provide that no work in the Embroideries Industry shall be done in or about a home, apartment, [fol. 169] tenement or room in a residential establishment, except by such persons as have obtained special home work certificates pursuant to applicable regulations of the Wage and Hour Division authorizing the issuance of such certificates to an industrial home worker who is unable to adjust to factory work because of age or physical or mental disability or is unable to leave home because his presence is required to care for an invalid in the home and who prior to November 2, 1942 was working for an employer as an industrial home worker in the Embroideries Industry (except that if this requirement results in unusual hardship to the individual home worker it shall not be applied) or is at any time engaged in such industrial home work under the supervision of a State vocational rehabilitation agency or of a sheltered workshop as defined in Section 525.1, Part 525, Chapter V, Title 29, Code of Federal Regulations.

#### V. Posting of Notice

I also deem it necessary under Section 8(f) of the Act to require that every employer employing any employees in commerce or in the production of goods for commerce in the Embroideries Industry shall post and keep posted in a conspicuous place in each department of his establishment where such employees are working such notices of this order as shall be prescribed from time to time by the

Wage and Hour Division of the United States Department of Labor.

The order issued pursuant to this Opinion shall become effective on September 20, 1943.

Signed at New York, New York, this 21st day of August, 1943.

L. Metcalfe Walling, Administrator Wage and Hour Division, United States Department of Labor.

[fol. 170] UNITED STATES DEPARTMENT OF LABOR, WAGE & HOUR DIVISION

In the Matter of: Hearing of the minimum wage recommendations of Industry Committee No. 45 for the Embroideries Industry and the prohibition, restriction, or regulation of homework in the industry.

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TESTIMONY OF BENJAMIN SPRUNG

(S. M. 1440-1475)

BENJAMIN SPRUNG, appearing on behalf of the Manufacturers of Military and Naval Insignia Devices, after being duly sworn, testified as follows:

Direct examination.

By Mr. Allan:

The Witness: There are approximately seven or eight firms in the New York area, who manufacture military and naval gold and silver embroidery insignia devices. These insignia devices are articles which denote the rank, branch of armed services, or specialty of the military or naval officer wearing them. These articles are never permanently attached to the uniform of the officer wearing them. They are only attached by snap fasteners or a few threads. The insignia is manufactured, purchased and sold as a separate and independent article or item. The officer can readily remove it and transfer it from one garment or cap to another. This is usually done when the uniform is laundered or cleaned or discarded.

[fol. 171] The embroidery on these articles is made by employees of the manufacturer who owns the article. For instance, a manufacturer who makes a shoulder mark to be worn by an officer, purchases the raw fabric, cardboard, thread, buttons and snap fasteners and processes these items and manufactures the article upon which the embroidery is ultimately placed. His own employees embroider the insignia, thereby completing the item. These embroidered items are therefore separate and complete articles. They are kept in stock by the manufacturers and are made up also for special orders. For instance, when a licensed manufacturer or dealer of military or naval uniforms requires these items, that is, they are licensed by the government, he can obtain them directly from one of our manufacturers. In short, we are the suppliers of these items. Any governmental licensed dealer can carry them in stock separately or attach them to the officer's uniform if he manufactures or sells uniforms. They are accoutrements or accessories to the uniform. These insignia devices may be seen in the windows of army and navy stores where they are sold separate and apart from uniforms.

Although only the New York firms engaged in the business of manufacturing these military and naval insignias appear at this hearing and although to our knowledge there are only approximately a dozen firms throughout the entire United States specializing in this form of embroidered insignia these New York firms represent about 95% of the total volume of production throughout the country of these insignias.

In the production of these items a very high standard of workmanship and material is demanded by the military and naval regulations. For instance, the naval regulations require that the insignia be hand-embroidered with bullion; of definite specification as to format; and rigid standards of workmanship, craftsmanship and skill. This work is [fol. 172] entirely done by hand. The ordinary hand-embroiderer or crochet-beader is unable to and cannot perform the operations required for the manufacture of bullion embroidered insignia. A special aptitude, skill and artistry is required which few of such workers possess. For one who is capable of learning the art and has already had training in hand-embroidery a period from at least six months to a year is required before that person could be-

come sufficiently proficient to perform the operations of bullion embroidery; and then only upon a limited number of the many items of naval and military insignia worn by the officers of both the army and navy and the enlisted personnel.

Because of the demands of the present war emergency and because of the woeful lack of and scarcity of help, all of the firms engaged in manufacturing military and naval insignia are working at capacity and there is an extremely large backlog of orders which the manufacturers are finding extremely difficult and impossible to fulfill.

The manufacturers estimated that five times the presently employed number of military embroiderers possessing a fair degree of skill and experience would be necessary to keep up with the demands made upon us.

The New York firms in the aggregate employ approximately 300 workers who are engaged in this type of embroidery work. Of these, approximately 200 or over 66 $\frac{2}{3}$ % are home-workers. It is a fact that the highest skilled workers are found predominantly in the home-workers group. One reason for this is the comparatively high age average for home-workers as compared with factory workers.

For instance, one employer reported that the average age of the Homeworker women working for him was 52 years. Another reports the average age of home-workers is between 55 to 60.

The experience of the manufacturers of the group I speak for is that it has always been very difficult to get sufficient [fol. 173] workers to do this type of work and today this condition is even more aggravated. One reason for this is the length of time and the difficulty in training workers. Hand-embroidery workers have selected this type of work for the reason that it can so easily be done at home. At the present time, when factory jobs are available for women in defense industries at good rates of pay, our manufacturers have found it difficult to secure learners. In the past many years attempts to obtain new employees by means of advertisements in foreign language and English newspapers were dismal failures. Our experience for the past eleven months has been such that constant advertising resulted in our ability to secure no experienced workers whatsoever. The few home-workers which were obtained were secured either through word of mouth or by the en-

ployers inducing former workers who had left the industry to assist us in this emergency. Higher rates of pay was a further inducement to them.

Nearly all of the home-workers engaged in military embroidery state that they would not under any circumstances work in factories for one or more of the following reasons:

(1) Poor health and advanced age of either themselves or some of their relatives for whom they are responsible.

(2) The necessity of supervising children for the home generally. Practically all of the home-workers are women and most of them are married. For instance, for one concern where 15 inside workers and 31 home-workers are employed, 5 of the 15 inside workers are married, whereas 26 of the 31 homeworkers are married. In another plant where there are 86 home-workers, 74 of them are married.

(3) The distance of the home-worker's residence from the factory. One manufacturer reports that all of his home-workers live outside of New York City.

[fol. 174] (4) A great many of these workers consider themselves artisans who would not under any circumstances work in a factory.

(5) Physical handicaps or the necessity of taking care of physically handicapped relatives, which I have also included in number one.

Most of the women homeworkers work merely to supplement their husband's earnings and not because of absolute necessity.

If homeworkers are eliminated or restricted to those who are physically handicapped or who have to take care of physically handicapped persons, then since 66 $\frac{2}{3}$ % of military embroiderers are homeworkers, the production of military embroidered insignia would be hopelessly curtailed. The elimination of homeworkers from this field would not result in the transfer of these workers from home to factory. There would be an inability to meet the requirements of the military and naval departments, and consequently would definitely interfere with and impede the war program.

It should be stressed that none of the evils attendant upon homeworkers in the past history of other industries can be found present among the homeworkers who embroider military insignias. The earnings per hour for a forty hour week among these workers range from 40¢ to 90¢. Most workers earn at least 68¢ per hour. It should also be pointed out that whereas in other types of embroidery there is a constant and considerable change and variation in style, making the settling of piece rates a difficult process, in this field the insignia device is standardized by military and naval authorities and do not change perhaps more than once in a decade. Consequently, it is a simple matter to fix the piece rate for each item, and to ascertain the time spent by homeworkers in making each item. The record [fol. 175] keeping provisions of the Wage and Hour Act are thus complied with without difficulty.

Because of the national emergency, our employers have been compelled to induce older workers, many of whom are well over the age of 50, who have ceased working altogether and who are not employable as factory workers, to return to this type of work. Such employers, however, flatly refuse to work in factories. If homework were curtailed, the military force would lose the specialized services of these people.

Military embroiderers are well paid. Since this is so, there is no economic compulsion to work more than eight hours a day in order to earn a fair day's pay even under today's high standards. It has been the experience of the industry for the piece rate of a particular insignia device to rise rather than decline once it has been set. Even prior to the present emergency, the industry has never had a sufficient supply of labor. In this type of work there are no seasons or peak employment or unemployment periods and anyone capable of doing this type of work could always procure employment. He would be hired immediately. Consequently, this specialized field of embroidery never provided fertile ground for the exploitation of labor.

Objections which have been raised to homework generally do not apply to the military embroidery field. Because of the degree of skill required, a homemaker's children cannot possibly assist the homemaker to do this work. Therefore, not only do we find no such violations of the child labor provisions of the Fair Labor Standards Act, but there

is no danger whatsoever of such violations occurring. Furthermore, because of the scarcity of employees available for this work, assistance of homeworkers by neighbors or other members of the family will not be encountered. Since this work is performed upon a small frame and requires no machines or complicated equipment of any kind, there [fol. 176] is no danger of the conversion of their homes into factories. A week's supply of material can be put into a shoe box and carried under their arm.

With regard to homeworkers, the record of this industry's compliance with the Fair Labor Standards Act is excellent; there have been no violations of the minimum wage standard and all manufacturers heartily endorse the establishment of a 40¢ minimum hourly wage rate, but vigorously object to any prohibition or restriction of homework among our manufacturers.

Q. Mr. Sprung, can you tell us the number of separate and different items which the military and naval embroiderers are required to manufacture to comply with the Government's requirements?

A. I have never counted them up, but I imagine there are more than sixty.

Q. Now, I show you this book which purports to be a volume published by the United States Navy, with respect to uniform regulations, and ask you to look at it and explain what that book is and from that tell us, if you can, the number of different items that are manufactured by the embroiderers.

A. This is a copy issued by the United States Navy, "Uniform Regulations". It covers every uniform and every article that goes on a uniform that is worn in the Navy, any branch of the Navy. It will take me a few minutes to check through, I have already marked them up, to tell you how many items there are.

Q. Can you give us an estimate?

A. There must be about 60.

Q. About sixty items?

A. Yes, sir. Pardon me, these are embroidery items I am speaking of.

Q. Yes, I am confining myself strictly to items which require embroidery.

A. Hand embroidery.

Q. Hand embroidery. Now, among the sixty items which are prepared and manufactured and processed by the mili-

tary and naval embroiderers, do they prepare the process [fol. 177] and manufacture the items which I now show you and which have been previously marked for identification in this record?

A. Yes, sir, they do.

Mr. Allan: I offer this entire page as one exhibit into the record.

Mr. Meikeljohn: Is that your Allan exhibit you wish to put in evidence?

Mr. Allan: Yes, as one exhibit.

The Witness: One of them is an Army insignia. The others are all Navy.

Examiner Campbell: Without objection, the samples of hand embroidery, seven in number, of the insignia of the Army and Navy will be included in the record of this hearing as Exhibit No. 1 of Samuel S. Allan.

Mr. Allen: All right, thank you.

(Samuel S. Allan's Exhibit No. 1 was received in evidence subject to the provisions set forth by the Examiner.)

By Mr. Allan:

Q. Now, Mr. Sprung, the items of insignia which you spoke about a little while ago refer to various classes of officers, do they not, commissioned officers?

A. Yes, it is the commissioned officers, the chief and warrant officers, and for the enlisted men. I might say at this point, there seem to be about 75 or 80 items.

Q. There are about 75 or 80 separate and different items?

A. Yes.

Q. Containing hand embroidery which are manufactured and produced by the group of military embroiderers here?

A. Yes, sir.

Q. Now, in the preparation and processing of these military insignia, are you required to follow the specifications laid down by the United States Navy?

A. Yes, sir, strictly.

[fol. 178] Q. In the book which is now before us, can you find the regulations which refer to the manner and method of manufacture?

A. Just a description in the regulations.

Q. And, is there a separate volume or leaflet which is published by the United States Navy which contains the

specifications under which they are to be prepared?

A. There is, sir.

Q. I show you this leaflet, No. 71D1, dated October 1, 1931, superseding No. 55D12, June 1, 1927, and ask you to tell us whether or not this pamphlet contains the specifications which you are now to follow or the manufacturers of insignia, are now to follow in the preparation and production of those items?

A. Yes, this is the official specification now prevalent issued by the Navy Department.

Mr. Allan: Now, I offer this in evidence.

Examiner Campbell: Without objection the Navy Department's specification referred to by Mr. Allan will be made a part of the record of this hearing and marked Samuel S. Allan's Exhibit No. 2.

(Samuel S. Allan's Exhibit No. 2 was received in evidence subject to the provisions set forth by the Examiner.)

By Mr. Allan:

Q. Now, in the volume which you have before you, Mr. Sprung, are there any photographs containing the many items which the military and naval embroiderers manufacture and produce for the Navy and Army?

A. Yes, there are.

Q. Now, can you point out in that volume those particular photographs?

A. Yes, I can, one indicated on plate No. 31 and on plates 65, 66, 67, 68, 69, and 70.

[fol. 179] Mr. Allan: Now, I offer those plates in evidence as a further exhibit with this qualification, sir, that I will have to furnish photographs of those in place of the originals because of the necessity of keeping the particular volume intact as it is.

Mr. Lieberman: Off the record.

(Discussion off the record.)

Examiner Campbell: Without objection, photostatic copies in duplicate of plates Nos. 31, 65, 66, 67, 68, 69, and 70, contained in the uniform regulations of the United States Navy will be included as the Samuel S. Allan Exhibit No. 3 in the record of this hearing.

Mr. Allan: Thank you, sir.

(Samuel S. Allan's Exhibit No. 3 was received in evidence subject to the provisions set forth by the Examiner.)

By Mr. Allan:

Q. Now, Mr. Sprung, in the preparation, processing, and production of the various items, I have selected one item which you are to explain to the Hearer, the process from its very inception to its final completion and show you this mounting and ask you to state after examining the mounting and explain for the purposes of the record the processes in the production of an insignia worn by a lieutenant of the United States Navy, known as a shoulder mark, and ask you first whether or not the fabric, the cloth is purchased by the manufacturer or the embroiderer in this instance?

A. Yes, this cloth is purchased in large bolts, many yards to the bolt.

Q. Will you proceed to explain the entire process from the time the bolt of cloth is purchased until the time the article is finished?

A. A large strip of this material is placed on a table, and the particular blank of the design which is sought to be [fol. 180] reproduced on it, or produced on it, is pasted on there.

Q. First, let me ask you ~~is the cloth~~ cut into separate pieces?

A. First we use a large piece of cloth. A large piece of cloth is used. It isn't cut separately—we cut it in pieces about three yards long. Many of these blanks are put upon it, in this case a star, we paste a piece of cardboard—a cardboard star is pasted—or many cardboard stars are pasted in regular order on the large piece of cloth, so located that each one can be cut up into the beginning of a shoulder mark which is sought to be made. This is called a blank. This blank is prepared in the shop. Then this blank in this format, being a piece of cloth about 3 inches wide and 6 inches long with the cardboard stars in the center of it, of whatever insignia is sought to be made is given out to the hand worker, and when it comes back with the stars embroidered on it with bullion—

Examiner Campbell (interposing): As in your exhibit there?

The Witness: As I showed it. That is mounted there-after on a cardboard filler approximately the size of the finished item.

By Mr. Allan:

Q. And do you own the cardboard filler?

A. We buy that cardboard filler, yes, sir. When that is properly pasted on it looks like the item I am now holding up.

Q. The cloth is wrapped around this filler?

A. And glued on to it.

Q. And glued right on to it, yes.

A. To that is attached a strap and lining or tongue and lining back. We call it either tongue or strap.

Q. A leather strap?

A. A leather strap which itself is sewn in the shop on to the lining, that when it is placed together with the last [fol. 181] piece I showed from which the finished item, almost the finished item, a hole is punched here and another one here and the button inserted.

Q. Is a hole placed on the leather strap?

A. A hole is placed in the leather strap and a corresponding buckle or snap button is placed on the other side of the entire object so that the leather tongue can be snapped shut as shown in this finished item upon which the particular rank of lieutenant appears to have been placed, in addition to the star.

Q. Now, will you please insert these back into their respective places. Now, every operation that you described and every piece of material which you describe that goes into the manufacture of this item is done by the military or naval embroiderer?

A. It is.

Q. And that is his product?

A. That is right, sir.

Q. And the final or finished item is the unit or article which is then delivered to the United States Navy or Army as the case may be?

A. Yes, sir.

Mr. Allan: I offer in evidence the mounting from which the witness has testified.

Examiner Campbell: Without objection the cardboard containing the items referred to in the testimony of Mr.

Sprung just given will be included in the record of this hearing as Samuel S. Allan Exhibit No. 4.

(Samuel S. Allan's Exhibit No. 4 was received in evidence subject to the provisions set forth by the Examiner.)

By Mr. Allan:

Q. Now, taking the lieutenant's shoulder mark, which is the finished product, can you tell us how and in what way that is attached to the uniform?

[fol 182] A. The tongue snap is opened, and the tongue itself is inserted through the loop on the shoulder of the uniform and then the button snapped to it, and that is exactly how it holds on the uniform. These are worn on khaki work uniforms, white dress uniforms, or on an overcoat, but it can be taken on or off for cleaning, whenever the uniform is cleaned, or discarded or to replace this if this happens to be damaged.

Q. Now, without further burdening this record, what I want you to tell us is whether or not each and every item which is manufactured and processed by the military and naval embroiderer is an article made of fabric which the embroiderer owns as the result of a purchase made by him, processed in his own plant either by sewing or pasting as the case may be, and finished by the embroiderer into a final and finished product, is that correct?

A. One small correction.

Q. What is that, sir.

A. You used the word embroiderer in the beginning where you probably meant manufacturer. If the stenographer will read the question, I will point out.

Q. Yes, by the manufacturer who is also an embroiderer who is appearing in this case in this hearing.

A. My answer is yes.

Mr. Allan: That is all.

Examiner Campbell: Questions, Mr. Lieberman?

Cross-examination.

By Mr. Lieberman:

Q. Mr. Sprung, you are a manufacturer?

A. No.

Q. Will you please state to us your profession or occupation. I wasn't present when you started?

A. I am connected with Vanguard Military Equipment Corporation, one of the manufacturers of naval and military devices.

Q. In what capacity?

A. Administrative and executive capacity.

[fol. 163] Q. And you have been connected with that firm for quite a while?

A. Yes, I have been connected with it since about 1935.

Q. And when you testified today in answer to the various questions propounded by Mr. Allan, have you testified as to your knowledge of the firm with which you are connected or other firms in the industry as well?

A. Both.

Q. Are you acquainted with the other firms in the industry?

A. Yes, sir, I am. There aren't very many, another five or six.

Q. Now, the firm that you are connected with I think you said is Vanguard Military Equipment?

A. Yes, sir.

Q. Does that firm limit its activity to the embroidery work, or it has various equipment for the military?

A. So far as the manufacturing is concerned, that is all they manufacture.

Q. And other articles they purchase and sell?

A. Yes, sir.

Q. Did I understand you to say that these embroidered articles to which specific reference was made by Mr. Allan, are sold also in retail stores?

A. That is right.

Q. And those that are sold in the retail stores, are they manufactured in accordance with Government orders to this firm?

A. Yes, sir.

Q. And the orders sold—

A. (Interposing) Not the orders, you mean the regulations, which is it?

Q. I asked the orders.

A. On no private orders.

Q. When Mr. Allan asked you whether these various emblems and stars are delivered to the Navy in accordance with their orders, you meant then to say that if it is manufactured under order by the Navy, then it is delivered to the Navy.

A. Orders that are made on the Navy contracts are delivered to the Navy.

Q. And if the order is from a private concern, then you deliver it to that private concern?

A. Only if the private concern is a licensed concern.

[fol. 184] Q. In other words, at this present time, the concern has to be licensed, but so far as you, the maker of the embroidered articles, you work for that concern in accordance with your agreement with that concern and not with the Navy?

A. We don't work for any concern.

Q. At the present time.

A. We sell them, we don't work for them.

Q. In other words, you make it up and you sell?

A. That is right, we don't work for anybody.

Q. Are Government inspectors located in your respective establishments to find out whether the work is done in accordance with the specifications?

A. No, sir.

Q. Are you acquainted with the fact that in all other articles when orders are placed by the Army and Navy, an inspector of the Army and Navy is in that particular shop to see whether the orders are made in accordance with the requirements?

A. I don't know.

Q. You said that these articles are manufactured in accordance with the specification of the Navy, is that correct?

A. That is right, sir, regardless of where they go to.

Q. Is it not true that any article manufactured for the Government or for the Navy must be manufactured in accordance with specifications of the Navy?

A. That is right.

Q. So that, therefore, if hats or shoes or anything else are manufactured for them, it must be in accordance with specifications?

A. I don't know; I suppose so; I don't make the other articles.

Q. You said you are acquainted with the other firms in this branch of work?

A. I am.

Q. Are you acquainted with the firm Gemsco, Inc.?

A. Gemsco?

Q. Gemsco?

A. Gemsco, yes.

Q. Do you know where it is located

A. Yes.

Q. And how long have you known that firm?

A. The first I heard of them was about 1935.

[fol. 185] Q. Do you know where they are located?

A. I do.

Q. And do you know what they manufacture?

A. Not everything. They are a very large firm. I know lots of things they make.

Q. Is it not a fact that that particular firm manufactures hand embroidery, Schiffli, Bonnaz, Club, school, industrial, uniform, and sportswear?

A. I am not aware of it.

Q. Will you please look at the telephone directory, and I ask you whether the firm of Gemseo, Inc. is the firm about which we are talking is this particular firm to which you have reference?

A. That is right.

Q. This is the firm?

A. That is right.

Q. And is it not a fact that according to the telephone directory—and I have reference to the classified telephone directory of August 1942—there appears the following: "Gemseo, Inc., hand, Schiffli, Bonnaz, club, school, industrial, uniform, sportswear", and the address is 395 Fourth Avenue at 28th Street, New York City, Telephone, Lexington 2-3060?

A. Yes.

Q. Is that correct?

A. Yes.

Q. Are you acquainted with the firm of Hertz & Co.?

A. Yes.

Q. And Hertz & Co. is one of the firms to whom you have reference?

A. Yes.

Q. Now, I ask you is it not a fact that that particular firm manufactures various articles in connection with the military embroidery?

A. I don't know. I am only interested in one angle of this, and that is the military insignia.

Q. First, be good enough—

Mr. Allan (interposing): Let the witness answer. Mr. Lieberman, please.

Mr. Lieberman: Let us not start to quarrel. I will come back to my question. What is the use of wasting time? [fol. 186] Mr. Allan: You are not going to quarrel with me. I think this witness is entitled to receive the courtesy every witness received here and be permitted to answer fully and completely.

Mr. Lieberman: May the record show there is not the slightest attempt on my part to be discourteous or deprive him of any answer.

Mr. Allan: Let the record show Mr. Lieberman, perhaps inadvertently interrupted the witness when he was about to complete his answer.

By Mr. Lieberman:

Q. Mr. Sprung, is that firm located at 753 Broadway?

A. That is right.

Q. I show you again the same classified telephone directory, and I ask you to look at page 313 of the telephone directory. Will you please look at it?

A. I am looking at it.

Q. Does there appear the name of Hertz & Co.?

A. That is right.

Q. And the address, 753 Broadway?

A. That is right.

Q. Corner 8th Street?

A. That is correct.

Q. And this is the firm to which you had reference?

A. That is right.

Q. Will you please read from the telephone directory as to what articles according to this directory appear to be manufactured by that firm? Read it for the record.

Mr. Allan: Before you answer—Major, I don't want to interrupt Mr. Lieberman. I trust you are not going to consider my action rude, but I should like to have the record show that our appearance here relates only to the question concerning embroidery. And whether military embroidery and naval embroidery, and whether the particular [fol. 187] concern is engaged in manufacturing shoes, ladies' underwear, or men's hats, or anything else is not of any importance. It is not material to the hearing. We are not going into that. I don't see how that has anything to do with the issue. It is only a waste of a lot of time.

Examiner Campbell: Mr. Lieberman, will you give us a statement covering what you are driving at?

Mr. Lieberman: In my opinion, it has a direct bearing for reasons that I thought I will state later, but I may as well mention some of it right now. If this very firm is manufacturing all kinds of embroidery articles under the very same name of that firm, and when an exception is sought by that firm just for one branch of it, I think the Administrator ought to know all the facts bearing on that issue, especially when it is done by that very same firm.

Mr. Allan: I will tell you what I will do. I will state for the record, and I will put it in writing that I will advise the Administrator of every other branch of work, if any, any of the concerns I am representing is doing in addition to military embroidery.

Mr. Lieberman: So why should there be any objection on your part to having that read then?

Mr. Allan: It wastes time.

Mr. Lieberman: I believe we wasted more time talking about it than it would have taken the witness to answer. Wait a minute, Mr. Witness. I don't want at the present time to argue with you, Mr. Allan and I will argue out the point. You will be good enough, if you are so directed, to answer that question. Then I am sure Mr. Allan will bring out from you whatever else he deems advisable. May I have an answer then to that question?

Mr. Allan: Before we do, let us get a ruling.

The Witness: You directed me to do something?

[fol. 188] Examiner Campbell: Will you answer the question?

The Witness: I wasn't asked a question, I was asked to read.

By Mr. Lieberman:

Q. Mr. Sprung, have you looked at this telephone directory?

A. I looked at it, yes, sir. I answered all your questions.

Q. Will you be good enough to read for the record what articles according to this telephone directory appear to be manufactured by the Hertz & Co.?

A. No articles appear to be manufactured. I am sorry, you will have to read that ad yourself as you see it. I have another thought about that I can tell you.

Q. You decline to read this particular article?

A. I decline to read it as you have stated in that question, articles you said that appeared to be manufactured by this concern. Nothing appears to be manufactured.

Q. Will you please read?

A. I will read an ad that is in there.

Q. You will read the ad that appears in there?

A. I will read the ad that appears.

Q. Will you kindly read the ad that appears under the name of Hertz & Co. in this?

A. "Hand, Singer, Schiffli, Bonnaz for School, Uniform Trade, Military and Clubs. Phone for Prices and Samples, 753 Broadway, cor. 8th Street \* \* \* Algonqn 4-9152."

Mr. Lieberman: Thank you.

The Witness: You are welcome.

By Mr. Lieberman:

Q. And are you acquainted with the firm Tubell & Co.?

A. Yes, sir.

[fol. 189] Q. And that company is located at 25 Waverly Place?

A. Yes, sir.

Q. Does the ad of that company appear in the telephone directory on Page 315?

A. I will read the ad, save you time.

Q. All right, I appreciate your cooperation.

A. "Tubell & Co. Mfrs. of Hand Metallic, Singer, Bonnaz, and Schiffli Embroideries for Military, Uniform, School, Sportswear Trades 25 Waverly Pl (nr Bway) . . . Algonqn 4-6963."

Q. And all the names of the firms which we mentioned in my examination of you appear in the classified directory for embroidery?

A. Yes, sir. Let me see that. It might be under something else. It appears they are under here.

Q. All right.

A. Yes.

Q. Could you please tell us whether you firm received contracts from the Navy for the manufacture of the various articles you referred to there on the direct examination in excess of \$10,000?

A. I don't know the amounts. I think some of them are in excess of \$10,000.

Q. Will you please tell us whether you know or not of any prohibition of homework under contracts exceeding \$10,000?

A. I do know.

Q. Does the contract prohibit it?

A. The contract, no. Not the contract.

Q. Does the regulation of the government prohibit the manufacture of such articles at home?

A. The regulation of the government?

Q. Under the Quartermaster.

A. No. No.

Q. Do you know whether under the Walsh-Healey Act which makes every contract above \$10,000 subject to that law, whether homework is prohibited?

Mr. Allan: At this time, Mr. Examiner, I have given Mr. Lieberman a lot of latitude in that field and I don't see why we should go into that field, this work here comes under the prohibition or it does not come under [fol. 190] the prohibition, anything that this concern has or what contracts it has is nobody's business, for we are talking about operations, a particular operation which is being performed, hand embroidery, and not the business affairs of the concern whatsoever and I think that objection is well taken, sir.

Mr. Lieberman: You want to hear me on the objection?

Examiner Campbell: Yes.

Mr. Lieberman: I believe my question is having a bearing on the direct issue, because if my assumption is correct that the Walsh-Healey Act prohibits homework and if this firm takes such orders, then under those orders and the law it couldn't manufacture those articles in homework and therefore any regulation on prohibition under the Fair Labor Standards Act could not affect it by any means because it would be prohibited anyway.

Mr. Allan: We are not here trying whether or not there has been a violation of any act, and I think Mr. Lieberman is going not alone very far afield, but his statements are getting to be indeed very annoying, sir. I don't think it is his business to inquire into this thing.

Examiner Campbell: Mr. Lieberman, if the witness answered your question and the next question divulged the fact they used homework on that, would he not thereby be incriminating his firm?

Mr. Lieberman: My answer is, first, I may not ask the question that you thought I may ask. Second, if the witness thinks that he will incriminate himself and he will decline to answer on the ground that he may incriminate, it may be another story, but so far we haven't any reason to believe that the witness would incriminate himself by the answer.

Mr. Allan: I submit, your Honor, and I state again that we are not here trying the violation of any law and I think [fol. 191] it certainly is improper cross-examination at this hearing.

Mr. Lieberman: I want the record to show that the purpose of my question is not to show whether they violated that law at all. My main purpose is simply to find out what is the situation existing in this firm as well as others similarly situated in connection with the production of military articles referred to.

Examiner Campbell: There seems to me to be a legal question involved here, that I want to get some advice from counsel on. Excuse me, just a minute.

(Discussion off the record.)

Examiner Campbell: Mr. Lieberman, I think I am ready to rule this way, that your question as to the witness' familiarity with the requirements of the Walsh-Healey or Public Contracts Act are competent to the extent that they do not involve any disclosures as to the compliance or non-compliance of the witness' firm with such requirements.

Mr. Lieberman: All right, then, let the witness answer.

Examiner Campbell: When they tend to do that, they are not competent. Will you read the question back, reporter, please?

(The question was read by the reporters.)

Mr. Allan: I raised the objection to that question, sir.

Examiner Campbell: I have to rule that that in itself is a competent question.

Mr. Allan: I take exception, sir.

The Witness: The answer is yes.

By Mr. Lieberman:

Q. Does your firm employ any workers in the inside plant?

A. Yes.

[fol. 192] Q. How many?

A. 19.

Q. And for how long did the firm employ that many?

A. For the last two years.

Q. Are all these 19 engaged in one kind of work?

A. They do embroidery work. I am talking about embroiderers. We have 19 embroiderers. There are many more people. I assumed you meant embroiderers.

Q. I am glad you mentioned it because I may want to know whether there are other hand workers.

A. No, there aren't any.

Q. When you say other people you mean sales people or people having nothing to do with the preparation of the articles?

A. Nothing with embroidery, that is right.

Q. My question wasn't addressed to that. How long has your firm been engaged in embroidery work for the Army or Navy?

A. Since 1935.

Q. And during that period until now, the approximate number of inside hand workers was 19?

A. Oh, no, I said for the last two years. Before that it was less.

Q. How many was there before that?

A. It varied to about 12.

Q. And about how many homeworkers has your firm now outside of your plant, I am referring to homeworkers?

A. 32.

Q. And this number of 32 are just during the last two years?

A. That is right.

Q. And prior to the two years did your firm have homeworkers?

A. Yes.

Q. How many?

A. About 20.

Q. So that during the last two years your firm increased the number of homeworkers by 12.

A. Yes.

Q. It that correct, during the last two years the firm increased the number of inside handworkers, referring to embroidery, by 7 did you say?

A. That is right.

[fol. 193] Q. Are all the articles manufactured by your firm consisting of bullion embroidery or are there any other kinds of embroidery manufactured by your firm?

A. No, there is no other kind of embroidery manufactured by our firm?

Q. Only bullion embroidery?

A. Only bullion.

Q. Is any machine work done by your firm in connection with embroidery on the articles you had referred to?

A. No, sir.

Q. May I show you one of the 7 articles included in Allan's Exhibit 1?

A. Refers to the——

The Witness (interposing): Rating badge, Major.

Examiner Campbell: Refers to Warrant Officer's insignia, United States Navy.

By Mr. Lieberman:

Q. Will you please state whether any part of the work on this particular specimen is performed on the machine?

A. We buy the blank and we embroider the handwork on it. What else is done by machine, I don't know. I said what else is done by machine, I don't know.

Mr. Lieberman: You see, but I like to get it in retail instead of wholesale, if you don't mind. Will you please look at this particular specimen and point out—I withdraw that. May I ask you whether this part of the work is done on a machine?

A. I don't know. It looks like it.

Q. Would you say that in so far as this particular work is concerned——

A. (Interposing): Which?

Q. ~~This specimen~~ is concerned——

A. (Interposing) Yes.

Q. There is a part of it which is done by hand and a part of it done by machinery?

A. I know only about the part that is done by hand.

[fol. 194] Q. Is there another part of this which is not done by hand?

A. There may be. I am not sure.

Q. May I suggest, Mr. Sprung, I think we will get along much better if you will do your best to give me your answer to the question.

A. What I don't know, I can't answer. I am sorry.

Q. I am asking you now whether this part of the work which I pointed out to you is done on machine or by hand?

A. Maybe. I don't know. I have no knowledge.

Q. Is this part of the work done by your firm?

A. No, it isn't. I told you we buy this blank. It is called a blank.

Q. You buy, and please point out the part you call the blank on this.

A. The blue serge containing the red material on it.

Q. That is purchased by you from somebody else?

A. Yes, sir.

Q. So in so far as this specimen is concerned, the cloth on which the embroidery is made by you is—I withdraw that. In so far as this specimen is concerned, the cloth upon which your firm attached the embroidery belonged to somebody else before you attached the embroidery.

A. No, sir, it belonged to us when we attached the embroidery.

Q. And is the cloth purchased by you from another one who attaches the part which apparently was made by machine on this work?

A. Let me hear that question again, please.

Mr. Allan: There is no testimony here that it was made by machine, sir. I think Mr. Lieberman—

Mr. Lieberman (interposing): He said apparently.

Mr. Allan: We don't know whether it is apparent or not.

Examiner Campbell: That question seems to be all right.

Mr. Allan: I do not mind if he will try to get it from this witness.

[fol. 195] The Witness: May I have the stenographer read me the question, please?

Mr. Lieberman: I will reword that question for you.

By Mr. Lieberman:

Q. What term is used technically for the embroidery put upon this specimen? Is this the eagle?

A. The eagle. You are speaking of the hand embroidery?

Q. I am talking about hand embroidery. And underneath that eagle appears a certain insignia. What is that called technically?

A. A propeller.

Q. A propeller. Now outside of the eagle and propeller on this specimen, is there any other work done by your firm on it?

A. Oh, yes. As it appears on this blank, no. I thought you wanted the finished—

Q. (interposing) I only refer as it appears on this blank.

A. No, no the work.

Q. The cloth upon which the eagle and propeller are attached is bought by your firm or is it not bought by your firm from another concern?

A. I said we bought the blank. That is called the blank.

Q. And when you say the blank, that includes the cloth?

A. The blank consists of the blue cloth with the red stripe on it as you show it.

Q. So when you attached the embroidery, some other concern cut that piece of cloth and attached the other parts on it?

A. Let me have the first part.

(The question was read by the reporter.)

The Witness: No, that question isn't very clear. Not when we attached, when we bought it.

[fol. 196] By Mr. Lieberman:

Q. Do you recall answering Mr. Allan that a strip of goods three yards long are first cut in connection with the making of stars?

A. That is right.

Q. I ask you now whether in connection with the making of this eagle are long strips of cloth cut by your concern?

A. No.

Q. So the part that you call blank, which consists of a cloth and what other trimming on it—what is this trimming technically called?

A. The embroidery.

Q. How will you distinguish this embroidery from the embroidery put on this particular specimen by your concern?

A. I don't know. We don't make it. I don't know.

Q. Will you please, then, describe for the record what particular work is done by your concern on this specimen after the blank which consists of the cloth and the kind of embroidery appearing here in red, apparently called embroidery, is purchased by you?

A. We place our blank on it, the blank in the shape of an eagle and propeller, which is done by glueing a cardboard stamped affair, which we stamp out in our shop, that eagle and propeller guide, acts as a guide, is pasted on to that cloth and that's given out to the embroiderers or if it's done in the shop it's done by our embroiderers in the shop. They embroider that eagle and propeller over the design or blank, and when it's brought back to us we finish it off into a different design, in the finished design.

Q. The embroidery outside of the hand embroidery placed by your firm is called "chevrons" is it not?

A. That's right, sir.

Q. And the chevrons are attached to the cloth by the manufacturer from whom you buy the blank?

A. I assume so.

[fol. 197] Q. When the blank is purchased by you does it consist only of the cloth or as well of the buckram attached to this particular specimen?

A. Some do and some don't.

Q. Will you please look at this specimen in my hands, which is one of the seven numbers in Allan Exhibit 1? I ask you whether the buckram has been attached to the blank before you purchased it?

A. There is two buckrams on here. One is attached to the blank when we buy it and the other is placed on there by our embroiderer.

Q. When you say two buckrams, the buckram which covers the entire blank has been attached by the manufacturer of the blank, is that correct?

A. I suppose so.

Q. I ask you would you be good enough—

A. I suppose so.

Q. And when you say the other piece of buckram you mean the buckram which is subsequently attached to cover the space on which the eagle and the propeller are used?

A. That's right.

Q. Is that correct?

A. That's correct.

Q. I show you another specimen from the seven numbers, part of S. Allan Exhibit 1.

Examiner Campbell: Which is a captain's shoulder strap.

By Mr. Lieberman:

Q. Which is a captain's shoulder strap. Will you please state whether any work is performed on this strap on a machine?

A. No. It is all hand work.

Q. Is all the embroidery used on this strap bullion, or any other kind?

A. It is all bullion. There is one piece of silk thread.

Q. Is that the inside?

A. The inside.

[fols. 198-199] Q. In connection with the manufacture of this strap is the goods first cut in your factory?

A. Yes, sir, all made from raw material, the whole thing.

Q. The embroidery is done by the homeworkers?

A. No—

Q. Or by handworkers?

A. That's right, by handworkers.

Q. Subsequent to the making of the embroidery is there any pasting done between the two pieces?

A. Yes, in our shop.

Q. And the pasting is later on done in the shop inside?

A. That's right. By us.

Q. That is done also by another kind of handworkers?

A. Yes.

Mr. Lieberman: That is all.

Mr. Allan: That's all.

Mr. Kaliski: I don't know whether Mr. Meiklejohn wanted to ask questions or not.

Mr. Allan: We will furnish them with the photostats of this.

Examiner Campbell: Let us take a recess of about five minutes for Mr. Meiklejohn.

Mr. Friedman: Major, I understand he is over at the Wage and Hour Division.

Examiner Campbell: We find we can't have this room after 5:30 so we have to go to Room 1610, 165 West 46th Street.

(Mr. Meiklejohn enters.)

Examiner Campbell: Do you have any questions for Mr. Sprung, Mr. Meiklejohn?

Mr. Meiklejohn: No I believe not.

Examiner Campbell: Apparently there are no further questions for you, Mr. Sprung.

(Witness excused.)

• • • • •

[fol. 200]

#### REGULATIONS

The following Regulations, Part 633.100-112 applicable to the employment of industrial home workers in the Embroideries Industry are hereby issued pursuant to Sections 8(f) and 11(c) of the Fair Labor Standards Act of 1938, and Section 633.3 of the Regulations of the Wage and Hour Division. These regulations shall become effective March 31, 1944,\* and shall be in force and effect until repealed [fol. 201] or modified by regulations hereafter made and published.

Signed at New York, New York, this 21st day of August, 1943.

L. Metcalfe Walling, Administrator, Wage and Hour Division, United States Department of Labor.

Published in Federal Register September 2, 1943.

Whereas, Section 8(f) of the Fair Labor Standards Act of 1938 provides as follows:

Orders issued under this section shall • • • contain such terms and conditions as the Administrator finds necessary to carry out the purposes of such orders, to prevent the circumvention or evasion thereof, and to safeguard the minimum wage rates established therein. • • •

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\* As amended November 9, 1943. 8 F. R. 15362.

and

Whereas, Section 633.3 of the wage order for the Embroideries Industry issued pursuant to Section 8(f) of the Act provides as follows:

No work in the Embroideries Industry, as defined herein, shall be done in or about a home, apartment, tenement, or room in a residential establishment after March 31, 1944,\* except by such persons as have obtained special home work certificates issued pursuant to applicable regulations of the Wage and Hour Division, authorizing industrial home work by a worker who—

[fol. 202] (1) (a) is unable to adjust to factory work because of age or physical or mental disability; or

(b) is unable to leave home because his presence is required to care for an invalid in the home; and

(2) (a) was engaged in industrial home work in the Industry, as defined, prior to November 2, 1942 (except that if this requirement shall result in unusual hardship to the individual home worker it shall not be applied); or

(b) is at any time engaged in such industrial home work under the supervision of a State Vocational Rehabilitation Agency or of a Sheltered Work Shop, as defined in section 525.1, Part 525, Chapter V, Title 29, Code of Federal Regulations.

and

Whereas, Section 11(c) of the Act provides as follows:

Every employer subject to any provision of this Act or of any order issued under this Act shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as

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\* As amended November 9, 1943. 8 F. R. 15362.

necessary or appropriate for the enforcement of the provisions of this Act or the regulations or orders thereunder.

Now, therefore, the following regulations are hereby issued. These regulations shall become effective on March [fol. 203] 31, 1944 \* and shall be in force and effect until repealed or modified by regulations hereafter made and published.

#### Section 633.101—Definitions

As used in these regulations, the term "industrial home work" means the production by any person in or about a home, apartment, tenement, or room in a residential establishment, for an employer, of goods from material furnished directly by or indirectly for such employer.

"The Embroideries Industry" as used herein means:

The production of all kinds of hand and machine-made embroideries and ornamental stitchings, including, but not by way of limitation, tucking, shirring, smocking, hemstitching, hand rolling, fagoting, Bonnaz embroidery, appliqueing, crochet beading, hand drawing, machine drawing, rhinestone trimming, sequin trimming, spangle trimming, eyelets, passementerie, pleating, the application of rhinestones and nailheads, stamping and perforating of designs, Schiffli embroidery and laces, burnt-out laces and velvets, Swiss hand-machine embroidery, thread splitting, embroidery thread cutting, scallop cutting, lace cutting, lace making-up, making-up of embroidered yard goods, straight cutting of embroidery and cutting out of embroidery, embroidery trimmings, bindings (not made in textile establishments), pipings and emblems; *provided, however*, that (1) the foregoing when produced or performed by a manufacturer of a garment, fabric or other article for use on such garment, fabric or other article, and (2) the manufacture of covered buttons and buckies, shall not be included.

#### Section 633.102—Application on Official Forms

Certificates authorizing the employment of industrial home workers in the Embroideries Industry may be issued

\* As amended November 9, 1943. 8 F. R. 15362.

upon the following terms and conditions upon application therefor on forms provided by the Wage and Hour Division. Such forms shall be signed by both the home worker and the employer.

#### Section 633.103—Terms and Conditions for the Issuance of Certificates

If the application is in proper form and sets forth facts showing that the worker—

(1) (a) is unable to adjust to factory work because of age or physical or mental disability; or

(b) is unable to leave home because his presence is required to care for an invalid in the home; and

(2) (a) was engaged in industrial home work in the Industry, as defined, prior to November 2, 1942 (except that if this requirement shall result in unusual hardship to the individual home worker it shall not be applied); or

(b) is at any time engaged in such industrial home work under the supervision of a State Vocational Rehabilitation Agency or of a Sheltered Work Shop, as defined in section 525.1, Part 525, Chapter V, Title 29, Code of Federal Regulations,

[fol. 205] a certificate may be issued authorizing the applicant employer to employ the worker in industrial home work in the Embroideries Industry.

No home worker shall perform industrial home work for more than one employer in the Embroideries Industry, but home work employment in another industry shall not be a bar to the issuance of a certificate for the Embroideries Industry.

#### Section 633.104—Investigation May Be Ordered to Determine Whether the Facts Justify the Issuance of Certificate

An investigation may be ordered in any case to obtain additional data or facts. A medical examination of the worker or invalid may be ordered or a certification of facts concerning eligibility for the certificate by designated officers of the State or Federal Government may be required.

### Section 633.105—Termination of Certificates

Certificates shall be valid under the terms set forth in the certificate for a period of not more than 12 months from the date of issuance or such shorter period as may be fixed in the certificate. Application for renewal of any certificate shall be filed in the same manner as an original application under these regulations.

### Section 633.106—Revocation and Cancellation

Any certificate may be revoked for cause at any time. Violation of any provision of the Fair Labor Standards Act shall be sufficient grounds for revocation of all certificates issued to an employer, in which event no certificate [fol. 206] shall be issued to the offending employer for a period of one year. In any proceedings for the revocation or cancellation of a certificate, interested parties shall be provided an opportunity to be heard.

### Section 633.107—Preservation of Certificate

A copy of the certificate shall be sent to the home worker, who shall keep such certificate on the premises on which the work is performed.

A copy of the certificate shall be sent to the employer, who shall keep this copy on file in the same place at which the worker's employment records are maintained.

### Section 633.108—Records and Reports

The issuance of a certificate shall not relieve the employer of the duty of maintaining the records required by Regulations, Part 516, and failure to keep such records shall be sufficient cause for the cancellation of certificates issued to such an employer.

Each employer of industrial home workers in the Embroideries Industry shall submit to the regional office of the Wage and Hour Division for the region in which his place of business is located on April 1 and October 1 of each year, the homework handbooks of each employee employed by him during the preceding six month period in industrial home work in the Embroideries Industry. This report shall also include a list of the names, addresses, and certificate numbers of home workers for whom home work certificates have been obtained, but who were not employed

in industrial home work in the Embroideries Industry during such period.

[fol. 207]      Section 633.109—Wage Rates

Wages at a rate of not less than 40 cents per hour shall be paid by every employer to each of his home work employees except as subminimum employment of specific handicapped workers has been provided for by special certificates issued by the Wage and Hour Division pursuant to Regulations, Parts 524 and 525. All hours worked in excess of 40 in any workweek shall be compensated for at one and one-half times the regular rate of pay.

Section 633.110—Delegation of Authority to Grant, Deny or Cancel a Certificate

The Administrator may from time to time designate and appoint members of his staff or State agencies as his authorized representatives with full power and authority to grant, deny or cancel home work certificates.

Section 633.111—Petition for Review

Any person aggrieved by the action of an authorized representative of the Administrator in granting or denying a certificate may, within 15 days thereafter or within such additional time as the Administrator for cause shown may allow, file with the Administrator a petition for review of the action of such representative praying for such relief as is desired. Such petition for review, if duly filed, will be acted upon by the Administrator or an authorized representative of the Administrator who took no part in the proceeding being reviewed. All interested parties will be afforded an opportunity to present their views in support of or in opposition to the matters prayed for in the petition.

[fol. 208]      Section 633.112—Petition for Amendment of Regulations

Any person wishing a revision of any of the terms of the foregoing regulations may submit in writing to the Administrator a petition setting forth the changes desired and reasons for proposing them. If upon inspection of the petition the Administrator believes that reasonable

cause for amendment of the rules and regulations is set forth, the Administrator will either schedule a hearing with due notice to interested persons or will make other provisions to afford interested persons opportunity to present their views in support of or in opposition to the proposed changes. The foregoing sections are issued pursuant to Section 633.3, of the Regulations of the Wage and Hour Division and Sections 8(f) and 11(c) of the Fair Labor Standards Act of 1938.

[fol. 52] Extract From Testimony of Solomon S. Friedman.  
S. M. 1339-1341

The Witness: Under the same conditions as outlined in my testimony of November 11, additional questionnaires from homeworkers were received by me, and I am now in a position to state for the record the recapitulation of 297 of these statements. Of the 297, 135 were sworn to before a notary public; 162 are unsworn statements. The recapitulation shows the following:

288 homeworkers of the 297 stated their ages, and the average age for the 288 homeworkers, is 42 years minus; of the 297 homeworkers, 92 were engaged in crochet beading; 132 were engaged in hand embroidery; and 73 were engaged in other handcrafts in the embroidery industry.

The average experience of the 297 homeworkers was 10 years. Their average weekly earnings during the season was \$14.50 per week. Going back for a moment to the ages of these 288 homeworkers, the recapitulation shows that 55 of these women were 50 years and over; 54 of them were between the ages of 45 to 50; 47 of them were between the ages of 40 to 45. In other words, 156 women of the 288 were either 40 years or over, and 132 of the 288 were under 40 years of age.

259 of the women stated they were married; 37 were unmarried. Of the 259 who were married, 21 were either widows or were separated from their husbands or were divorced from them. 204 of the husbands are employed; 33 are not employed. The average annual earnings of the husbands who are employed is \$1,240 a year.

For 208 homeworkers who had children in their families, the average number of children per family is 2 plus. Of the 208 families referred to, 113 had 2 or less children; 95 had three or more. Of the 95 families just referred to, 28 of them had 4 or more children and 14 of them had 5 or more children. 36 of the women stated that they supported a father or mother, or father-in-law, or mother-in-law.

[fol. 53] In answer to the question as to whether the homeworker could work in a factory if she were unable to get homework, of the 297, 10 of them answered, yes; 287 answered, no. For their reasons, of the 287, 164 stated it was because of children; 16 stated that it was because of husbands who were ill and had to be taken care of; 17 stated it

was because of parents; 96 gave other reasons which could not be broken down into separate classifications.

In answer to the question as to whether the homeworker was familiar with the Wage and Hour Law and the fact that it guaranteed a minimum wage for each hour put in on homework irrespective of the piece-work rate, 160 stated that they were so familiar with the act; 101 said that they were not acquainted with the act in that particular; and 36 made no answer at all.

Examiner Campbell: Does that complete your recapitulation?

The Witness: That is correct sir. At this time, so that the record will be complete, I again offer the 297 statements referred as an exhibit on behalf of the National Embroidery Association.

Examiner Campbell: For the reasons explained yesterday, Mr. Friedman, we will decline to accept those for the record.

Mr. Lieberman: Mr. Examiner, may the record further show that according to the testimony of this witness, 132 of these very answers were not sworn to.

The Witness: 162.

Mr. Lieberman: 162.

The Witness: That is correct; and may the record show, sir, that I except to your ruling? Okay, Mr. Lieberman.

Mr. Lieberman: Before I proceed with the cross examination, may the record show that my questioning of the witness shall in no way be interpreted as any attempt on my part to reflect either upon the credibility or upon the integrity of the witness.

[fol. 54] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE  
SECOND CIRCUIT, OCTOBER TERM, 1943

Nos. 361-362-363

(Argued May 23, 1944

Decided June 27, 1944)

JOSEPHINE GUISEPPI, et al., Petitioners,

vs.

L. METCALFE WALLING, Administrator of the Wage and Hour  
Division, United States Department of Labor, Respond-  
ent

MILDRED MARETZO, et al., Petitioners,

vs.

L. METCALFE WALLING, Administrator of the Wage and Hour  
Division, United States Department of Labor, Respond-  
ent

GEMSCO, INC., et al., Petitioners

vs.

L. METCALFE WALLING, Administrator of the Wage and Hour  
Division, United States Department of Labor, Respond-  
ent

[fol. 55] Before: L. Hand, Swan and Frank, Circuit Judges.

Petitions to review and set aside a portion of a wage  
order of the Wage and Hour Administrator. Petitions  
denied.

Douglas B. Maggs, Archibald Cox, Louis Sherman, Irving  
Rozen, Kenneth Meiklejohn and Faye Blackburn, for re-  
spondent.

Landau & Friedman (Solomon S. Friedman, of counsel)  
for petitioners, Josephine Guiseppi, et al.

Brower, Brill & Tompkins (Ilo Orleans and Coleman  
Gangel, of counsel) for petitioners, Mildred Maretzo, et al.

Weisman, Quinn, Allan & Spett (Samuel S. Allan and  
Seymour D. Altmark, of counsel) for petitioners Gemseo,  
Inc., et al.

Kraushaar & Kraushaar (Meyer Kraushaar, of counsel)  
for Lidz Brothers, Inc., Amicus Curiae.

Erwin Feldman, for Harlem-Adler Co., Inc., and Schner-Block Company, Amicus Curiae.

The wage order in question here, issued pursuant to §8 of the Fair Labor Standards Act (29 U. S. C. A. 201, *et seq.*), relates to the embroideries industry. On June 6, 1942, the Administrator appointed an industry committee No. 45 [fol. 56] "to investigate conditions in the industry and recommend to the Administrator minimum wage rates for all employees thereof" who are subject to the Act. The industry committee unanimously recommended the establishment of a minimum wage rate of 40 cents an hour for all employees in the industry and transmitted to the Administrator its report and recommendation. A notice of hearing was published in the Federal Register on September 16, 1942, which stated that evidence would be received on the questions: "1. Whether the recommendations of Industry Committee No. 45 should be approved or disapproved; 2. In the event an order is issued approving the recommendations, what, if any, prohibition, restriction or regulation of home work in this industry is necessary to carry out the purpose of such order, to prevent the circumvention or evasion thereof and to safeguard the minimum wage rates established therein."

The public hearing was held in November 1942. All interested parties were given an opportunity to be heard. Extensive testimony and many exhibits were received in evidence. On August 21, 1943, the Administrator issued his findings and opinion based on the evidence adduced at the hearing and on the same day, issued the wage order under review.

The chief term of the Wage Order for the Embroideries Industry is a provision establishing the rate of 40 cents an hour as the minimum wage to be paid by an employer under Section 6 of the Fair Labor Standards Act to each of his employees in the industry who is engaged in interstate commerce or in the production of goods for interstate commerce. The order also contains a definition of the Embroideries Industry. In addition the wage order provides:

"No work in the Embroideries Industry, as defined herein, shall be done in or about a home, apartment, tenement, or room in a residential establishment after November 15,

[fol. 57] 1943,<sup>1</sup> except by such persons as have obtained special home work certificates issued pursuant to applicable regulations of the Wage and Hour Division, authorizing industrial home work by a worker who (1) (a) Is unable to adjust to factory work because of age or physical or mental disability; or (b) Is unable to leave home because his presence is required to care for an invalid in the home; and (2) (a) Was engaged in industrial home work in the Industry, as defined, prior to November 2, 1942 (except that if this requirement shall result in unusual hardship to the individual homemaker it shall not be applied); or (b) Is at any time engaged in such industrial home work under the supervision of a State Vocational Rehabilitation Agency or of a Sheltered Work Shop, as defined in §525.1, Part 525, Chapter V, Title 29, Code of Federal Regulations."

The Administrator's findings on the subject of home work may be summarized as follows:

Home work in the embroideries industry is distributed to the workers directly by regular embroidery manufacturers or contractors who have their own shops, and indirectly through contract shops or distributors. The number of home worker employees per firm varies greatly; in New York the average per firm is 26 workers; in Pennsylvania, the average is nine. The work done at home does not differ from that done by other employees in factories.

In the years just prior to the administrative hearing, the practice of distributing embroidery work among homes was widespread in the industry. In June 1942, there were 18,500 factory workers. The number of employees, working at home, which cannot be ascertained precisely, ranged upwards from 8,500—35 per cent of the total. Some 70 per cent of the home workers were employed by New York firms; [fol. 58] 17 per cent by employers in New Jersey, and the rest were scattered throughout other States. The proportion of home worker employees to all employees, however, **has not always been so high**; for example, N. R. A. codes for four branches of the industry prohibited home work and thus must have concentrated a greater proportion of the work in the factories.

Experience under the Fair Labor Standards Act and under earlier wage orders issued pursuant to it, has dem-

<sup>1</sup> The effective date was postponed to May 15, 1944.

onstrated that the practice of distributing work to employees in their homes result in "wholesale violation of the minimum wage and record keeping requirements of the Act and regulations" and furnishes "a ready means of circumventing or evading the minimum wage order." This was demonstrated by inspections made of 222 firms in the Industry during the period between May 1, 1941, and May 1, 1942. Only 3 per cent of those firms were found to be in compliance.

Although special record keeping regulations had been issued providing for the use of handbooks in which employees could record their hours of work and earnings, it was found that 95 per cent of the employers had not kept records at all or had kept inadequate or inaccurate records. Forty-six per cent had not used handbooks at all. Many others had failed to keep proper records of home workers' hours, a basic requisite in determining compliance. In addition, there was evidence that records were being falsified; for example, by recording as hours worked not the actual number, but a fictitious figure determined by dividing the weekly earnings by the prevailing minimum wage.

In the absence of adequate records, it was difficult to obtain adequate data showing the extent of violations of prior minimum wage orders as distinguished from record keeping violations, but it is clear that they were widespread. A survey conducted by the Economics Branch of the Wage [fol. 59] and Hour Division showed that even in the eighteen months boom period between January 1941 and July 1942, more than 60 per cent of the home workers were paid less than 37½ cents an hour, in violation of the wage order then applicable. Approximately a third of the home workers received less than 25 cents an hour; one-sixth, less than 20 cents and in some instances—1.8 per cent of the total—the employers did not pay even 10 cents an hour for the work. A survey by the New York State Department of Labor confirmed these findings of the Wage and Hour Division. The violations extended to all branches and operations in the industry.

The apparent impossibility of enforcing a minimum wage among home workers is due in large part, of course, to the opportunities for evasion which the practice of employing home workers affords to the unscrupulous seeking unfair competitive advantages. The problem also arises,

however, from the difficulties inherent in the varied circumstances under which home work is performed and the lack of supervision which make it impossible for well-intentioned employers as well as government inspectors to obtain accurate knowledge as to how home workers spend their time, under what conditions they work, and what help they secure from other persons. A number of factors inseparable from the practice itself, contribute to the problem: Payment is on a piece work basis and it is impossible to fix rates for home workers which will yield the least skilled worker the minimum without paying the skilled worker an uneconomical wage. The industry is dependent upon novel variations in designs and for each design a new rate must be set. The general rule is to time a sample worker in the factory and to apply the rate thus obtained to the same work when the operation is done in a home. Some employers merely fix an arbitrary rate. Inevitably, the actual hourly earnings of the home workers vary widely [fol. 60] from the standard and among themselves. Home work conditions are not subject to control or standardization as are those in a factory; yet the condition under which a task is done governs in large part the speed with which it is accomplished. The home workers themselves vary greatly in skill, productivity, and efficiency; styles and operations vary greatly among home workers whereas in a factory the most efficient techniques can be singled out and taught to all. As a result "piece rates cannot practically be set so as to reflect accurately the hours of work of the home worker or secure reliably a definite hourly wage."

The problem would not be solved by requiring that "make up" be paid to the slower workers because it is virtually impossible to determine their hours of work. The lack of employer supervision, the participation of other persons in picking up and delivering work (which is work time), the frequent participation of other members of the family in doing the home worker's work, as well as the intermittent character of home work itself all make it a practical impossibility for either employer or employee to keep an accurate check of the time worked and the wages due to make up the established minimum. One home worker, for example, who believed that she had been paid the applicable minimum and was called by her employer to testify against the proposal to restrict home work, was found to have

earned considerable below the minimum. Furthermore, fear of loss of employment induces many home workers to refrain from reporting time worked in excess of the time which the employer indicates should be required. For these reasons the regulation of home work, even if it included further regulation of record-keeping practices or governmental establishment of piece rates, would not be adequate to secure effective enforcement of the minimum wage. But the problem is not simply to secure payment of the minimum wage rate for the home workers alone. If the 40 cent minimum were not paid to the home workers, [fol. 61] competitive disadvantage would result to employers of factory labor, thereby undermining the wage structure throughout the industry and thwarting the purposes of the order and the Act. "The evidence adduced at the hearing conclusively shows that large proportions of home work employees in the Embroideries Industry and in all of its branches are paid less than the applicable minimum. It is apparent that if some employers are allowed to utilize home workers at subminimum wage scales, other employers compelled to pay a 40-cent minimum will be placed at a competitive disadvantage.

Experience in comparable industries has shown that the transfer of work from home to factory can be accomplished without hardship to employees or their employers. After home work was prohibited in the men's neckwear and men's clothing industries by regulations issued under the National Industrial Recovery Act, the Department of Labor conducted a survey which revealed that probably 80 per cent of the home workers were thereafter employed in factories and only one firm ceased business. In the men's clothing industry, 94 per cent of the home workers transferred to factory operation. The home workers who shifted to the factory found little trouble in self-adjustment irrespective of age, and output improved in quantity and quality. Hourly earnings increased as much as 200 per cent.

Similar experience has been reported in the administration of laws restricting the employment of home workers in Rhode Island, New Jersey, and New York. In Rhode Island, for example, the Department of Labor in 1938 issued a wage order establishing minimum wages for women and minors in the wearing apparel and accessories industry and, in order to safeguard the minimum, the wage order

included a term prohibiting industrial home work. The wage order covered "embroidery operations" performed on underwear, handkerchiefs, infants' and children's cloth-[fol. 62] ing, women's dresses and gift novelties. The manufacturers of these articles experienced no difficulty in bringing home workers into the factories and the Rhode Island industry has continued to grow.

Conditions in the embroideries industry generally and in each of its branches also indicate specifically that the members of the industry will not have any great difficulties in adjusting their methods of doing business to the prohibition of industrial home work, and that they will not suffer undue hardship or competitive disadvantage. Referring to the contention of military embroiderers that there will be a decrease of production in their part of the industry, the Administrator found "The evidence in the record not only does not support any such contention, but indicates rather that production of these types of embroidery may be stimulated and increased."

From the foregoing findings and from all the evidence, the Administrator concluded as follows: "It is my finding, after due consideration of the low wage rates paid home workers and the competitive relationship among various types of the embroidery operations that it is necessary to provide terms and conditions with respect to the restriction of home work to carry out the purposes of the minimum wage order for the Industry, to prevent the circumvention or evasion thereof and to safeguard the 40-cent hourly minimum established therein \* \* \*

"I have considered all the evidence relating to adjustment to the factory system of manufacture and find that this adjustment can reasonably be made without undue hardship upon home workers or home work employees \* \* \* Prohibition of home work will not prohibit any type of work or occupation but will merely compel the transfer of work and occupations formerly carried on in the homes to the factory where the workers may be adequately supervised and their payment in accordance with the mini-[fol. 63] mum wage order for the industry guaranteed. The possibilities of adjustment to a prohibition of home work which are disclosed by the record furnish ample assurance that no substantial curtailment of operation will

result. All of the operations in question are carried on in the factory as well as in the home."

In his opinion the Administrator said: "This proceeding is not concerned with the question whether home work is desirable or undesirable from a social point of view or as a form of economic organization. It is concerned solely with whether the home work system in the Embroideries Industry furnishes a means of circumventing or evading a wage order putting into effect the minimum wage recommendation of Industry Committee No. 45 so that it is necessary to provide in the wage order for its regulation, restriction or prohibition in order to carry out the purposes of such order and to safeguard the minimum wage rate established therein."

Petitioners have brought these review proceedings (consolidated for convenience) under § 10 of the Act, asking this court to review and set aside the provisions of the order prohibiting home work.

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FRANK, *Circuit Judge*:

1. Our starting point is this: Without the prohibition of home-work contained in the order of the Administrator, the Act, in its application to this industry, will be unenforceable and will become virtually a dead letter. For so it was found as a fact by the Administrator, to whom the Act assigns its enforcement.<sup>2</sup> And the truth of his findings petitioners cannot here dispute, since they do not assert that those findings are not supported by substantial evidence heard at the Administrator's hearing. At most, some of the petitioners cite a part of the evidence which is at variance with the findings but make no effort to show that there was not other contrary evidence of a substantial character. Moreover, as the printed supplements to their briefs, filed under our Rule 22, do not contain all the evidence, we must assume that, if we were to read all of it, the findings would be amply justified.<sup>3</sup> We

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<sup>3</sup> Cf. *Railroad Commission v. Pacific Gas & Electric Co.*, 302 U. S. 388, 392, 398, 401; *Spiller v. A. T. & S. F. Ry. Co.*, 253 U. S. 117, 125; *Mississippi Valley Barge Line Co. v. U. S.*, 292 U. S. 282, 286; *Edward Hines Trustees v. U. S.*, 263 U. S. 143, 148.

<sup>2</sup> See the last sentence of § 11(a) and § 17.

must, too, take those findings "at their face value," although the Act did not require the Administrator to make them.<sup>4</sup> Indeed, assuming for the moment that, if necessary to make the statute effective, the Act conferred on him the power to issue such a regulation, there is a "presumption of the existence of facts justifying its . . . exercise."<sup>5</sup>

2. Notwithstanding that, on this record, petitioners are obliged to confess that the wage order will fail without the home work prohibition, they assert that the Administrator had no power to issue it. Faced with the provisions of §8(f)—which authorize him to insert in wage orders issued pursuant to §8 "such terms and conditions as" he "finds necessary to carry out the purposes of such orders, to prevent circumvention, and to safeguard minimum wage rates established therein"—petitioners say that, although on the facts here the elimination of home work is perhaps within that language, the regulation is so sweeping in its consequences that, had Congress intended to authorize it, the [fol. 65] statute would have dealt with that subject specifically as it does with child labor in §12. But in §12 Congress dealt with child labor as an independent matter, completely eliminating the employment of minors in the affected industries because of the socially and economically undesirable character of such employment and without regard to the effect on the wage rates and hours of adults. Here the Administrator has prohibited home work not at all on the ground of its inherent undesirability but solely as a means of preventing the circumvention or evasion of an order prescribing adult wage rates. Moreover, doubtless having in mind the provision of §8(b) that a wage order must "not substantially curtail employment in the industry," the Administrator has made a finding (which we must accept as true) that the home work regulation will have no such effect; the findings show that its consequences to the employers and employees is not as drastic as petitioners assert in their briefs. This is not a case, then, where an

<sup>4</sup> See *Steuart & Bro. Inc. v. Bowles*, — U. S. — (May 22, 1944) where the Court so held as to findings of the Price Administrator when acting pursuant to a statute which did not require findings.

<sup>5</sup> *Pacific State Co. v. White*, 296 U. S. 176, 186.

effort is being made to utilize §8(f) as a subterfuge to achieve an independent end outside the scope of the Act; the regulation here is a means of accomplishing the purpose of an authorized wage order by stopping evasions of that order, and the Administrator in §8(f) was expressly empowered to use means of that kind.<sup>6</sup> Nor, in view of the Administrator's findings, can it be said that this is a case where the means are so disproportionate to the authorized end that they cease to be means except in form and in truth become an independent end not contemplated in the Act.

[fol. 66] *Addison v. Holly Hill Fruit Products Co., Inc.*, — U. S. — (June 5, 1944) is not contrary to our conclusion. There the Court, interpreting one of the several specific exemptions from the Act, noted that those exemptions were "catalogued with particularity," and said: "Exemptions made in such detail preclude their enlargement by implication."

3. Petitioners, however, maintain that the amendment to the Act, in 1940, which added §6(a)(5), with its specific reference to homework in Puerto Rico and the Virgin Islands, shows that Congress denied power elsewhere with respect to that subject. That argument cannot stand up: for the legislative history of §6(a)(5) discloses that it was added to meet the peculiar economic conditions existing in Puerto Rico and the Virgin Islands; it might better be argued, indeed that Congress found it necessary to amend the Act by adding that subsection precisely in order to limit the exercise of that power theretofore existing, before that amendment, with respect to those and all other areas covered by the Act.

4. Petitioners further contend that the legislative history of §8(f) demonstrates that Congress did not intend thereby to delegate any authority concerning homework. That history, briefly told, is as follows: The Senate bill, as re-

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<sup>6</sup> Accordingly we see nothing in the suggestion that the regulation is invalid because the Administrator did not find that it would directly serve the declared policy of the Act set forth in §2. It is enough that it will do so indirectly, i. e., that it is a necessary adjunct to enforcement of the wage order authorized by the Act, which order, in turn, is issued to achieve the declared purpose contained in §2.

ported by the Committee in charge, provides that all minimum wage rates and wage differentials should be established by a Board through the issuance of labor standard orders. With respect to such orders the Board was given powers in a provision substantially the same as §8(f) of the Act except that after the word "conditions" there was a parenthetical clause "(including the restriction or prohibition of such acts or practices)." On the floor, an amendment was adopted, without comment or objection, inserting [fol. 67] in the parenthesis the words "industrial homework." The original House bill, which was much the same as the Senate bill, included this same provision containing the matter in parenthesis. This bill, however, was recommitted. The House Committee then reported a new bill which contained no provision for wage orders but established fixed minimum wages, and included no provision resembling §8(f) i. e., for the prevention of circumvention or evasion. This substitute bill (with modifications not relevant here) passed the House. In the Conference Committee a compromise was made between the Senate and House bills which resulted in the present Act, with §6 containing fixed wage rates subject to acceleration as provided in §8. Neither the Conference Report nor the subsequent debates discussed any reasons for omitting the matter in the parenthesis from the provision which now appears as §8(f). We see nothing in that ambiguous history disclosing an intention to eliminate from §8(f) the power to prohibit home work if that prohibition is necessary to prevent circumvention or evasions.

*Cudahy Packing Company v. Holland*, 315 U. S. 357, is not in point. True, there, the Court referred to the fact that authority to delegate the subpoena power, expressly granted in the Senate bill, had been rejected by the Conference Committee; but, as the Court pointed out, the significance of that fact was that the Conference Committee substituted a provision giving the Administrator the subpoena power conferred upon the Federal Trade Commission, and that agency, and other agencies upon which like power had been conferred, had never theretofore construed it to include the right to delegate the issuance of subpoenas; the Court also said that, if the right to delegate the subpoena power were implied, then necessarily there would be a similar implication as to all the functions assigned by the

statute to the Administrator, a conclusion which the important nature of several of those functions precluded.

[fol. 68] 5. But petitioners assert that, even granting that §8(f), taken alone, would include the power to issue the home work order, other provisions of the Act show that Congress could not have intended to authorize so extensive a regulation. The argument runs thus: §8(f), by its terms, restricts the Administrator's authority to that of annexing "terms and conditions" to "orders" issued under §8; no similar power is given him as to wage rates automatically established under §6 when no §8 order is operative; by §8(e), all orders (except in unusual circumstances) expire in October 1945. If, then, say petitioners, §8(f) were construed to authorize the homework prohibition here, that prohibition would expire in 1945. It is unreasonable to believe, argue petitioners, that Congress intended that so extensive a prohibition should be in effect for a period of at most seven years (in this case a little more than a year), that home work could be banned during but a small span and not for the long future. Accordingly, petitioners urge, as §8(f) applies only to orders, it must, for the sake of consistency, be construed not to include so extensive a power.

That argument proves too much. It cannot stop with eliminating from §8(f) the authority to forbid home work. Pushed to its logical conclusion, this contention says that any regulation under that subsection lacks validity unless the statute expressly authorizes a similar regulation concerning all wage rates; petitioners would thus have us read §8(f) out of the Act. As, of course, petitioners do not venture to go that far, their "consistency" contention comes to this: §8(f) must be narrowly interpreted so as not to confer authority of any importance; in other words, the Administrator may make a regulation to prevent minor evasions of a wage order, but he is powerless to prevent major evasions which, as here, will gut the order. Such an interpretation—which flies in the face of the wording of §8(f), rendering it virtually meaningless, making practically useless many a wage order, thus all but destroying §8—ascribes to Congress an unreasonable intention.

Were it necessary for us here to pass on the matter, we would be obliged to consider whether consistency and reasonableness require that §8(f) be interpreted so as to apply

to all wage rates or whether, quite aside from §8(f), the Administrator has the implied power to issue regulations necessary to protect all wage rates from evasions.<sup>7</sup> But the power of the Administrator to safeguard wage rates when no wage order is in effect is an issue not now before us. Since in the instant case there is such a wage order, it is not our present concern whether or not the Act is deficient in its protection of wage rates not established by an order. If there is such a flaw, it is the function of Congress to deal with it. The legislative process is inherently such that, on occasions, the applications of a statute in practice disclose inconsistencies. While the literal meaning of a statute must yield to its evident purpose or policy, yet where a statutory provision accords with that purpose, the courts should seldom enlarge that provision, in the interest of symmetry or uniformity, in order to supply an omission.<sup>8</sup> In interpreting another section of this very Act, the Supreme Court said the other day: "Legislation introducing a new system is at best empirical, and not infrequently administration reveals gaps or inadequacies of one [fol. 70] sort or another that may call for amendatory legislation. But it is no warrant for extending a statute that experience may disclose that it should have been made more comprehensive."<sup>9</sup> If, then, it were true that, in working out the compromise between the House and Senate bills, Congress, by literally restricting the provisions of §8(f) to orders, inconsistently left other wage rates subject to

<sup>7</sup> See, e. g., *Edward's Lessee v. Darby*, 12 Wheat. 206, 208; *U. S. v. Madaniel*, 7 Pet. 1, 14; *Boske v. Commingore*, 177 U. S. 459, 469-470; *Fed. Trade Commission v. Western Meat Co.*, 272 U. S. 554, 555-559; *Alaska S. S. Co. v. U. S.*, 290 U. S. 256; *Phelps-Dodge Corp. v. N. L. R. B.*, 313 U. S. 177, 194-196; *Morgenthau, Implied Regulatory Powers in Administrative Law*, 23 Ia. 575 (1943); cf. *Osborn v. Bank*, 9 Wheat. 738, 865; *Solvents Corp. Mellon*, 277 F. 548, 550 (App. D. C.); *Hepburn v. Griswold*, 8 Wall. 603, 613.

<sup>8</sup> See, e. g., *McFeely v. Commissioner*, 296 U. S. 102, 111; *U. S. v. Union Pacific R. R. Co.*, 91 U. S. 72, 85; L. Hand, J., in *N. Y. Life Ins. Co. v. Bowers*, 39 F. (2d) 556, 559 (C. C. A. 2), aff'd 283 U. S. 242.

<sup>9</sup> *Addison v. Holly Products, Inc.*, — U. S. — (June 5, 1944).

evasion, that would be no reason for holding that, as to orders, Congress did not mean what it said.

6. We cannot agree with the suggestion that Congress, if it had intended the Administrator to regulate home work, would have required him first to consult the industry committees or to hold hearings. For §§ 7(c) and 13 empower him to take action having more extensive consequences without such consultation or hearings.

We also consider untenable the suggestion that the home work regulation is invalid because the statute did not expressly require a hearing as a condition precedent to its issuance. Aside from the fact that here such a hearing was in fact held, the short answer is that the Constitution does not require a hearing before the promulgation of such a regulation. *Bowles v. Willingham*, — U. S. — (March 27, 1944); *Phillips v. Commissioner*, 283 U. S. 589, 596-597; *Bi-Metallic Investment Co. v. State Board*, 239 U. S. 441.<sup>10</sup>

7. We reject the argument that stricter enforcement or some other measure would meet the problem without the [fol. 71] need for prohibiting home work, for the Administrator has made express findings to the contrary.<sup>11</sup>

8. Nor is there, we think, anything to the point that the Administrator had made an unreasonable discriminatory classification by his exemptions from the prohibition. The Fifth Amendment contains no "equal protection" clause.<sup>12</sup> Moreover, it is by no means clear that the exemption would be an invalid classification even under the Fourteenth Amendment.<sup>13</sup>

<sup>10</sup> When, pursuant to statute, courts make rules governing practice and procedure, they are not required, as condition precedent, to hold hearings. The question of the validity of those rules can be raised in specific cases arising under them.

<sup>11</sup> The contention of *Gemsco, et al.* (made half-heartedly before us) that manufacturers of military and naval insignia should not have been (or are not) included in the definition of this industry, is met by the Administrator's contrary findings.

<sup>12</sup> Cf. *Helvering v. Lerner Stores*, 314 U. S. 463, 468.

<sup>13</sup> Cf. *Queensboro Farms v. Wickard*, 137 F. (2d) 969, 977-978 (C. C. A. 2).

9. Equally unsound is the argument that the prohibition of home work violates due process. It is perhaps sufficient to note that, to support this argument, petitioners rely heavily on the remarks of Field, J., concerning liberty of contract in his concurring opinion in *Butchers Union Co. v. Crescent City Co.*, 111 U. S. 746, 757. Surely the extreme views there expressed are no longer authoritative.<sup>14</sup>

10. Finally we come to the contention that, if the statute confers the asserted authority on the Administrator, then it unconstitutionally delegates legislative power. The question raised by that contention is not new. More than two thousand years ago, a profound student of government, [fol. 72] from whom we derive the concept of a "government of laws, and not of men,"<sup>15</sup> explained the inescapability of some delegation by legislators. The "rule of law," he said, "is preferable to that of any individual" and "he who bids the law rule may be deemed to bid God and Reason alone rule, but he who bids man rule adds an element of the beast; for desire is a wild beast, and passion perverts the minds of rulers, even when they are the best of men," whereas "the law is reason unaffected by desire." But, sagely, he noted that "there may indeed be cases in which the law seems unable to determine," and asked "but in such cases can a man?" He answered that "the law trains officers for this express purpose, and appoints them to determine matters which are left undecided by it, to the best of their judgment. Further it permits them to make any amendment of the existing laws which experience suggests . . . And at this day there are magistrates, for example judges, who have authority to decide matters which the law is unable to determine . . ." He added that "no one

<sup>14</sup> See, e. g., *U. S. v. Darby*, 312 U. S. 100; *Jones & Laughlin*, 301 U. S. 1; *Phelps Dodge Corp. v. Labor Board*, 313 U. S. 177; *Olsen v. Nebraska*, 313 U. S. 236; *West Coast Hotel Co. v. Parrish*, 300 U. S. 379; cf. *Hume v. Moore-McCormack Lines*, 121 F. (2d) 336, 339-340.

<sup>15</sup> That phrase came into English thinking about government through Harrington's *Oceana* (1656) 2-29; Harrington there acknowledged borrowing it from Aristotle. John Adams, in turn, borrowing the phrase from Harrington who much influenced him, wrote it into the Bill of Rights of the Massachusetts Constitution of 1780.

doubts that the law would command and decide in the best manner whenever it could. But some things can, and others cannot, be comprehended under the law, and this is the origin of the vexed question whether the best law or the best man should rule. For matters of detail about which men deliberate cannot be included in legislation. Nor does anyone deny that the decisions of such matters must be left to man • • • " 15e

<sup>15a</sup> Aristotle, *Politics*, Bk. III, Ch. 16, 1287a, 24 et seq. He also spoke of "filling up the gaps which the law is obliged to leave."

And in his remarks elsewhere on "equity," he said that "all law is couched in general terms, but there are some cases upon which it is impossible to pronounce correctly in general terms. Accordingly, where a general statement is necessary, but such a statement cannot be correct, the law embraces the majority of cases, although it does not ignore the element of error. Nor is it the less correct on this account; for the error lies not in the law, nor in the legislature, but in the nature of the case. For it is plainly impossible to pronounce with complete accuracy upon such a subject matter as human action. Wherever then the terms of the law are general, but the particular case is an exception to the general law, it is right, where the legislator's rule is inadequate or erroneous in virtue of its generality, to rectify the defect which the legislator himself, if he were present, and had he known it, would have rectified in legislating • • • This is in fact the nature of the equitable; it is rectification of law where it fails through generality • • • For where the thing to be measured is indefinite the rule must be indefinite • • •" *Nicomachean Ethics*, Bk. V, Ch. 10, 1137b, 13-31. "The equitable seems to be just and equity is a kind of justice, but goes beyond the written law. This margin is left by legislators, sometimes voluntarily, sometimes involuntarily; involuntarily when the point escapes notice, voluntary when they are unable to lay down a definition, and yet it is necessary to lay down an absolute rule; also in cases where inexperience makes it hard to define • • •; for life would not be long enough for a person to enumerate the cases." *Rhetoric*, Bk. I, ch. 13.

By a "government of men" Aristotle apparently meant a government in which a specific judgment or decree affecting a specific person is rendered by the legislator or legisla-

[fol. 73] Without mentioning that author, our Supreme Court has often echoed his words. In 1904, it said,<sup>16</sup> "Congress legislated on the subject as far as was reasonably [fol. 74] practicable, and from the necessities of the case, was compelled to leave to executive officials the duty of bringing about the result pointed out by the statute. To deny the power of Congress to delegate such a duty would, in effect, amount but to declaring that the plenary power vested in Congress to regulate foreign commerce could not be efficaciously exerted." In 1934, it said, "Undoubtedly, legislation must often be adapted to complex conditions involving a host of details with which the national legislature cannot deal directly. The Constitution has never been regarded as denying to the Congress resources of flexibility and practicability \* \* \*. Without capacity to give authorizations of that sort we should have the anomaly of a legislative power which, in many circumstances, calling for its exertion, would be a futility."<sup>17</sup>

True, in the case last quoted and in another decided about the same time,<sup>18</sup> it was held that the delegations there involved were so lacking in adequate standards, so unrestrained, as to be unconstitutional. But, in the light of many subsequent decisions, those two cases must now be considered exceptional, restricted to their particular or very similar facts. The standard in § 8(f), coupled with the pro-

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tive body. Curiously, some of our Congressional "private bill" legislation would come within that criticized category.

Aristotle's point of view reappeared in a New York Times' editorial of December 15, 1943: "It is the proper function of Congress to frame laws and general policies, to delegate powers wherever detailed control is necessary, and to see that laws are properly administered. But it is not the function of Congress itself to administer the law. It is not its business to meddle in specific decisions. Once it does so \* \* \* it will find itself overwhelmed with administrative details that it is not remotely organized to attend to \* \* \*. Such detailed meddling can only \* \* \* lead towards administrative chaos."

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<sup>16</sup> *Buttfield v. Stranahan*, 192 U. S. 470, 496.

<sup>17</sup> *Panama Refining Co. v. Ryan*, 293 U. S. 388, 421 (check).

<sup>18</sup> *Schechter Corp. v. U. S.*, 295 U. S. 495.

visions of the other provisions of § 8 and with § 2, amply meet the test of adequacy of standards according to recent Supreme Court decisions.<sup>19</sup>

Petitioners scarcely try to distinguish those cases. They fall back on a rigid conception of the "separation of powers" [fol. 75] doctrine. Such an inflexible conception finds no justification in English or American history,<sup>20</sup> and cannot

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<sup>19</sup> See, e. g., *Opp Cotton Mills v. Administrator*, 312 U. S. 126; *Sunshine Anthracite Coal Co. v. Adkins*, 310 U. S. 381; *Yackus v. U. S.*, — U. S. — (March 27, 1944); *Bowles v. Willingham*, — U. S. — (March 27, 1944).

<sup>20</sup> See Holdsworth, 10 *History of English Law*, 720, for the grave inaccuracy of Montesquieu's description of the English government of the 18th century as one in which the three functions were clearly separated. "It is curious that some political theorists should have seen their favorite ideal, a complete separation of administration from judicature, realized in England; in England of all places in the world, where the two have for ages been inextricably blended"; Maitland, 3 *Collected Papers* (1911) 478; cf. Holmes, *Collected Legal Papers* (1920) 251, 263. That Montesquieu's idea, as to the judicial function was apparently not that adopted in his own country, see Franklin, *The Judiciary State*, 2 Nat. Lawyers' Guild Q. (1940) 244, 249-250. For "the conviction that the courts should not interfere with administrative action became the basic postulate of the French version of the separation of powers . . . ." Seagle, *The Quest For Law* (1941) 331.

Incorrect also is the notion that Coke, in the 17th century, espoused the "separation" doctrine. His attacks on the High Commission, an ecclesiastical court, and on other governmental agencies, were based on his contention that they were exercising powers not conferred on them by Parliament, never that Parliament could not do so or that there was anything inherently bad in a grant of combined judicial and executive or legislative functions. He sat in both the Privy Council and the Star Chamber which each exercised combined judicial and administrative powers of an extensive character. Not only did he not protest against that fusion of powers in those bodies but late in life described the Star Chamber as "the most honorable court (our

[fol. 76] be realized in practice.<sup>21</sup> As Holmes, J., said in his dissenting opinion in *Spinger v. Philippine Islands*, 277 U. S. 189, 211: "It does not seem to need argument that however we may disguise it by veiling words we do not and cannot carry out the distinction between legislative and executive action with mathematical precision and divide the branches into watertight compartments, were it ever so desirable to do so, which I am far from believing that it is, or that the Constitution requires."<sup>22</sup>

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Parliament excepted) that exists in the Christian world." 4 *Institutes* 65.

In this country, the Articles of Confederation made no provision for separating the three powers. And the discussions of Madison and Hamilton in *The Federalist* (Nos. 38, 47, 48 and 66) show not only that the constitutions of most American States after Independence by no means adhered rigidly to the tripartite separation but also that the federal Constitution was not intended to do so. See also, Nettels, *The Roots of American Civilization* (1938) 666; Merriam, *American Political Theories* (1903) Chapters II and III.

Jefferson came to have a poor opinion of Montesquieu. And in 1816 he said of the Virginia country courts, which performed such non-judicial functions as supervising schools, levying taxes and appointing sheriffs, "I acknowledge the value of this institution; it is in truth our principal executive and judiciary." 5 *Works* (Washington ed., 1853) 539; 7, *ibid*, 18.

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<sup>21</sup> Cf. Story, *The Constitution* (1833) Chapter VII.

The Supreme Court, as early as 1825, held that Congress may delegate to the Supreme Court a power which the Court regarded as legislative, i. e., the power to make or alter rules of procedure. *Wayman v. Southard*, 10 Wheat. 1.

<sup>22</sup> About a half century ago, William Bondy (now Judge Bondy) in his brilliant work, *Separation of Governmental Powers*, 5 *Columbia Studies in History, Economics and Public Law*, No. 2 (1896), illuminated this subject. He showed that the specific allocations of functions in the Constitution were determined by practical rather than theoretical considerations. He calls "administrative" any powers not explicitly allocated, although in their nature legislative, executive or judicial. Such powers, he suggests, Congress

As, in spite of Supreme Court decisions which should put the matter at rest, we still frequently hear arguments which assume an inherent infirmity in delegation of rule-making to administrative officers, it seems worthwhile to analyze the problem somewhat more in detail.

In the history of this country, subordinate legislative powers were delegated at an early day, both by our state [fol. 77] legislatures and Congress.<sup>23</sup> What is new for us

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may itself exercise or, by statute, assign either to the executive or judicial branches or to "administrative" officials. All that the "separation" doctrine means, he says, is this: If the Constitution expressly assigns a power to any one branch, the others may not interfere with its proper exercise; the courts, however, may, in a "case or controversy," determine whether a power has been properly exercised (except as to certain "political" matters and as to the exercise of certain powers by the Chief Executive.)

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<sup>23</sup> In 1787, the Vermont legislature assigned to the officials of the several towns of that state the task of granting rights to operate ferries and of regulating the grantees' "prices" and "profits," (such regulations "to be varied from time to time as occasion shall require") because, so the legislation said, "it has been found by experience that great advantage has been taken by ferrymen demanding unreasonable prices for their services" and "this Assembly cannot so well distinguish between the several rivers, and the several parts of said river, or lake, on account of distance, swiftness of water, number of travellers, etc." The state insurance departments are, we are told, "institutions with nearly a century of growth"; the state insurance commissioner "is partly executive, partly judicial and partly legislative"; no one can tell "when he stops legislating and begins to judge, or where he stops judging and begins to execute." Patterson, *The Insurance Commissioner in the United States* (1925) 5. In the federal government, administrative agencies dealing with the customs and with veterans were created in 1789, and the Patent Office had its start in 1790; eleven of the now-existing agencies had their beginnings between 1789 and the close of the Civil War; from 1865 to the end of the 19th century, six of the present boards were established; nine more date from the period

is the name "administrative law."<sup>24</sup> The writings of Goodnow and Freund introduced that name to the American legal profession several decades ago. But only in recent years has it come into extensive use. Even now, it finds no place in our conventional "digests." A new name, a novel label expressive of a new generalization, can have immense consequences. Emerson said; "Generalization is always a new influx of the divinity into the mind. Hence the thrill that attends it."<sup>25</sup> Confronted with disturbing variety, we often feel a tension from which a generalization, an abstraction, relieves us. It serves as a de-problemizer, aiding us to pass from an unstable, problematical, situation to a [fol. 78] more stable one. It satisfies a craving, meets what Emerson called "the insatiable demand of harmony in man," a demand which translates itself into the so-called "law" of "the least effort."<sup>26</sup> But the solution of a problem through the invention of a new generalization is no final solution: The new generalization breeds new problems. Stressing a newly perceived likeness between many particular happenings which had theretofore seemed unlike, it may blind us to continuing unlikenesses. Hypnotized by a label which emphasizes identities, we may be led to ignore differences. In all fields of thought this evil is encountered. Nowhere can it do more harm than in democratic government—and in democratic courthouse government in particular. For, with its stress on uniformity, an abstraction or generalization tends to become totalitarian

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1900-1918; and another nine from the period 1918-1929. See Report of the Attorney General Committee on Administrative Procedure (1941) 6-10.

<sup>24</sup> Patterson, loc. cit., 4.

One recalls Moliere's M. Jourdain who learned with pleasure, that, like literary men, he had been talking prose all his life.

<sup>25</sup> Emerson, *Circles*.

<sup>26</sup> Cf. Demogue, *Analysis of Fundamental Notions*, in *Modern French Legal Philosophy* (transl. 1916), 471; Kalten, *Art and Freedom* (1942) II, 708-710.

in its attitude towards uniquenesses.<sup>27</sup> While, then, the concept of "administrative law" is invaluable, because it pulls together for comparative study and common use, techniques and ideas developed in scattered areas of administrative action,<sup>28</sup> there is danger that that concept may yield inelastic uniformities. All administrators should not [fol. 79] be treated identically.<sup>29</sup> Yet the problem of the

<sup>27</sup> If there is "an insatiable demand of harmony in man," there is also an insatiable human delight in individualities (particularities) which defy uniformity. We should revise Gilbert and say, "That every boy and every gal, "That's born into the world alive, Is *both* a little Liberal, and a little Conservative." The proportions vary in different persons and in the same person at different times.

<sup>28</sup> Thus the new administrative service of Pike & Fischer has already induced the divers administrative agencies to borrow from one another. The Secretary of Agriculture, for instance, recently cited an S. E. C. opinion concerning fairness in the interpretation of an administrative regulation; see *In Re Middletown Milk & Cream Co., Inc.*, 3 A. D. 84, referring to *Matter of Consumers' Power Co.*, 6 S. E. C. 444.

<sup>29</sup> "The problems subsumed by 'judicial review' or 'administrative discretion' must be dealt with organically; they must be related to the implications of the particular interests that invoke a 'judicial review' or as to which 'administrative discretion' is exercised. Therefore, a subject like 'judicial review,' in any scientific development of administrative law must be studied not only horizontally but vertically, e. g., 'judicial review' of Federal Trade Commission orders, 'judicial review' of postal fraud orders, 'judicial review' of deportation warrants. For judicial review in postal cases, for instance, is colored by the whole structure of which it forms a part, just as in land office cases, or in immigration cases, or in utility valuations, or in insurance license revocations, it derives significance from the nature of the subject matter under review as well as from the agency which is reviewed." Frankfurter, *Introduction to Patterson*, loc. cit. xvi-xvii.

As Patterson says (loc. cit. 4-5), "one cannot assume . . . that the same code of procedure which works well in workmen's compensation will do for the regulation of

delegated powers of a particular administrative officer is illuminated by the recognition that it is part of a general problem common to what Patterson refers to as the "pluralistic universe of administrative law." The illumination, however, has brought fear to some. The very word "delegation," when now coupled with the words "administrative [fol. 80] officers," strikes terror in their hearts. They re-

insurance enterprises. As well apply the violent methods of military law to the taking of a census!"

Dean Landis in 1938 referred to "the insistence of Mr. Justice Brandeis that differences in treatment should be accorded to findings of fact by different administrative officials, because of differences in the facts and in the qualities of the administrative to be expert in finding the facts." He also said: "If the extent of judicial review is being shaped, as I believe, by reference to an appreciation of the qualities of expertness for decision that the administrative may possess, important consequences follow. The constitution of the administrative and the procedure employed by it become of great importance. That these factors already in part mold the scope of judicial review is apparent from the decisions. Different agencies receive different treatment from the courts. A reputation for fairness and thoroughness that attaches to a particular agency seeps through to the judges and affects them in their treatment of its decisions." Landis, *The Administrative Process* (1938) 143-144, 453.

Previously, Henderson, in *The Federal Trade Commission* (1924) 337, had said: "The expert judgment of the Interstate Commerce Commission is, as I have said, respected by the courts, and the only reason I can think of for not giving the same treatment to the findings of the Federal Trade Commission is that it is difficult to tell from the great majority of the findings that the Commission has ever exercised an expert judgment, since the reasons for the decision are never given. Despite the dicta of the Supreme Court, I venture the opinion that the matter is not yet foreclosed, and that if it should appear in some future case that the Commission has based its decision on an expert judgment of a practical nature, the court is still in a position to state that it will not substitute its own judgment for the judgment of the Commission. So long as the Commission adheres to

semble the child who was horrified when his attention was called to the facts that his tongue was wet and his shoes full of feet. For delegation is a name for something that has always been present in society and always will be.<sup>30</sup> Perhaps the fright the label engenders can be reduced by observing that "discretion," which is familiar, is kin to "delegation." Almost boundless discretion has traditionally been conferred upon state and federal prosecuting officers to begin or not to begin proceedings of enforcement of some of the huge number of penal statutes (and against some rather than against other violators) and to "settle" such cases by [fol. 81] "bargain day" methods.<sup>31</sup> Wide, too, is the benefi-

its present formal findings of fact, however, there can be little hope of such an outcome."

Recently the Supreme Court has shown signs of employing such an empirical, selective, test in its dealings with the several administrative agencies. Thus in *Dobson v. Commissioner*, 320 U. S. 489, 498, when announcing the extensive authority of the Tax Court in matters of "fact," the Court said: "It has established a tradition of freedom from bias and pressures." See, on the other hand, the increased strictness of the Court's attitude towards another agency in *Eastern-Central Ass'n v. U. S.*, 321 U. S. 194.

<sup>30</sup> Consider, for instance, the powers delegated to cities and counties to enact ordinances; to private corporations to enact "by-laws" affecting their stockholders and persons dealing with them; and to public utility corporations to make regulations affecting thousands of consumers. Cf. Allen, *Law In The Making* (1927) Ch. XII.

<sup>31</sup> Cf. Wallace, *Nullification: A Process of Government*, 45 Pol. Sc. Q. (1930) 347.

In 1941, in hearings on S.674, S.675 and S.918, Senator O'Mahoney said to a witness: "Now the question as to whether or not there shall be a complete separation of prosecution and adjudication in all of these matters, and your position that they cannot possibly be joined in the same person without great detriment, prompts me to suggest, because of your statement a moment ago, that in the ordinary criminal procedure, day after day, prosecuting attorneys are confronted with the problem of determining whether or not they shall proceed with a particular case,

cent discretion of courts sitting in equity to relax stiff legal rules.<sup>32</sup> And the power of courts in general to interpret statutes has been said by some persons to be, in practical effect, a sort of supplementary legislation which the legislature necessarily leaves to the courts.

Indeed, those who today criticize the transfer of "subsidiary legislation" to administrative officers forget that, inspired by somewhat similar motives, there has been and still is much criticism of the power exercised by judges in construing statutes, that Bentham, Livingston, and their disciples (some even in our time<sup>33</sup>) have insisted that all "law" must emanate solely from the legislature, and have [fol. 82] tried, through codification, to destroy all "judicial legislation."<sup>34</sup> Repeated attempts on the European continent to exploit that notion have invariably proved disappointing.<sup>35</sup> Legal certainty to be attained by eliminating,

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and whether or not a particular type of settlement will be made. Prosecuting attorneys, U. S. attorneys, attorneys in the various districts, county attorneys, State attorneys and the like are constantly making these decisions which come within the border line . . . ."

"In the Illinois Crime Survey of some dozen years ago, it was found that in a given year 13,117 felony prosecutions were begun in Chicago. Only 498—less than one in twenty-six—ever came to trial." Puttkammer, *Criminal Law Enforcement*, University of Chicago Law School, Reprint and Pamphlet Series (1941) No. 1, p. 6.

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<sup>32</sup> The hostility of the common law lawyers and judges to such discretion has often been compared with current hostile attitudes towards administrative agencies.

<sup>33</sup> Cf. Franklin, *The Judiciary State*, 3 Natl. Lawyers Guild Q. (1941) 26.

<sup>34</sup> See, e. g., the remarks of Edward Livingston and his colleagues in their preliminary report, in 1823, on the *Louisiana Civil Code*, *Legal Archives*, Vol. I, *A Republication of the Project of the Civil Code of Louisiana of 1825* (1937) xvii-xviii.

<sup>35</sup> See, e. g., Seagle, *The Quest For Law* (1941) Chapter XVIII.

via codification, all judicial law making is a fatuous dream.<sup>36</sup> Courts, in their interpretation of statutes often cannot avoid some such legislation. The enactment of many a statute thus, by implication, calls on the courts to engage in supplemental law making. That activity should always, of course, be modest in scope.<sup>37</sup> But the necessary generality in the wording of many statutes, and ineptness in the drafting of others, frequently compels the courts, as best they can, to fill in the gaps, an activity which, no matter how one may label it, is in part legislative.<sup>38</sup> Sagacious legal schol-

<sup>36</sup> The notion of a "Ministry of Justice" or Law Revision Committee is another matter. See Stone and Pettee, *Revision of Private Law*, 54 Harv. L. Rev. (1940) 221.

<sup>37</sup> *Comm'r v. Beck's Estate*, 129 F. (2d) 243, 245-246 (CCA 2); *New England Coal & Coke Co. v. Rutland R. R. Co.*, — F. (2d) — (C. C. A. 2).

<sup>38</sup> The remark of Bishop Hoadly, usually quoted in discussions of judicial legislation—"Nay, whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the Law Giver to all intents and purposes, and not the persons who first spoke and wrote them"—has been given a specific application to statutory interpretation. That judicial legislation is an inherent part of the work of the courts in the development of legal rules when no statutes are involved has been avowed by at least eight Supreme-Court Justices—Holmes, Hughes, Brandeis, Stone, Cardozo, Frankfurter, Douglas and Jackson; see citations in *New England Coal & Coke Co. v. Rutland R. R. Co.*, — F. (2d) —, note 31.

Many learned commentators have said the same; see, e. g., the citations in *Commissioner v. Beck's Estate*, 129 F. (2d) 243, 245, note 3; Waite, *Judge-Made Law And The Education of Lawyers*, 30 Am. Bar. Ass'n J. (1944) 253.

There has, however, been greater reluctance to admit that similarly, interpretation of statutes often requires such legislation. Yet it is difficult to justify a differentiation. Several students of continental legal systems have recognized that statutory construction often necessitates judge-made law. See Kiss, *Equity and Law*, in *The Science of Legal Method* (transl. 1917) 146; Lambert, *Codified and Case Law*, in the same volume, 251; Wurzel, *Juridical Thinking* (in the same volume), 286; Alvarez, *Methods For*

[fol. 83] ars of high repute, such as, for instance, John Chipman Gray, Wigmore, Allen and Radin, have said that courts, in discharging their duty of carrying out the express will of the legislature as faithfully as they can, are frequently unable to escape the responsibility of engaging in supplemental legislation.<sup>39</sup> As Chief Justice Hughes

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*Codes* (in the same volume) 429. As Mr. Justice Jackson recently noted, the Swiss Code candidly calls for such law-making by the judges; *State Tax Commission v. Aldrich*, 316 U. S. 174, 202, note 23.

Paul, *Federal Estate and Gift Taxation* (1942) I, 43-44, 62, 86-87, has observed that narrow or liberal construction of statutes often involves judicial legislation; cf. Jackson, *The Struggle For Judicial Supremacy* (1941) 58.

Seagle suggests that legislation actually leads to an increase of legislative activity by the courts. Seagle, *The Quest For Law* (1941) 298; cf. 196.

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<sup>39</sup> In *The Nature and Sources of Law* (2d ed. 1921) §370, Gray said "Interpretation is generally spoken of as if its function was to discover what the meaning of the legislature really was. But when the legislature has had a real intention, one way or another on a point, it is not once in a hundred times that any doubt arises as to what its intention was. If that were all that the judge had to do with the statute, interpretation of the statutes, instead of being one of the most difficult of a judge's duties, would be extremely easy. The fact is that the difficulties of so-called interpretation arise when the legislature has had no meaning at all; when the question which is raised on the statute never occurred to it; when what the judges have to do is, not to determine what the legislature did mean on a point which was present to its mind, but to guess what it would have intended on a point not present to its mind had the point been present." He also said that "when the judges are professing to declare what the legislature meant, they are in truth themselves legislating to fill up" the gaps.

See Wigmore, *The Judicial Function, in The Science of Legal Method* (1917) xxvi; Allen, *Law in The Making* (1927) 283, 286-287; Radin, *The Law and Mr. Smith* (1938) Chapter XIV.

[fol. 84] said in 1928, "a federal statute finally means what the [Supreme] Court says it means."<sup>40</sup> Thus the courts in their way, as administrators in their way, perform the task of supplementing statutes. In the case of the courts, we call it "interpretation," or "filling in the gaps"; in the case of administrators we call it "delegation" to "supply the details." In both instances, the task is unavoidable.

There are those who, while they grudgingly concede the necessity of delegation of subordinate legislative powers to administrative officers, are disturbed because currently it is accompanied by what they consider an unwise breadth of authority in fact-finding given to such officers when deciding particular cases arising under administrative regulations.<sup>40a</sup> Such persons urge the courts to set narrow limits to the extent to which legislative powers may validly be assigned to administrators. But authority to find the facts is inseparable from the decision of specific cases.<sup>40b</sup> Judges trying non-jury cases have at least an equal breadth of authority in fact-finding. And extensive indeed it is, since, in the process of decision-making, the "minor" (fact) premise often plays a part as important as (if not more important than) the "major" (rule) premise.<sup>41</sup> (Recognizing that, where the testimony is in conflict, the determination of the facts by a trial judge involves a guess as to the accuracy and honesty of the witnesses, some commentators have, indeed, referred to the "discre-

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<sup>40</sup> Hughes, *The Supreme Court of the United States* (1928) 230.

<sup>40a</sup> Cf. Chief Justice Hughes, Address before Federal Bar Ass'n, quoted in N. Y. Times, February 13, 1931, p. 18; Bell, *Let Me Find the Facts*, 26 Am. Bar. Ass'n J. (1940) 552. See *U. S. v. Forness*, 125 F. (2d) 928, 942 (C. C. A. 2).

<sup>40b</sup> It should be noted, too, that the courts which issue rules of procedure subsequently apply them when particular cases arise involving those rules. And the effect of such rules is no light matter: failure to comply with them has cost many a man his life, liberty or property.

<sup>41</sup> "The major," said Burke, "makes a pompous figure in the battle, but the victory depends upon the little minor of circumstance."

tion of the judge" in the "estimation of the testimony."<sup>42</sup>) Appellate courts sometimes make greater demands of administrators as to precision and detail in fact-finding than they ordinarily do of trial judges sitting without a jury<sup>43</sup>—although it is an open secret that some federal trial judges who resent their own obligation in non-jury cases to make findings of fact express antipathy to the fact-finding powers vested in administrative officials. And upper courts always require far more of administrators than they do of juries: few administrators are permitted to return general (factless) verdicts.<sup>44</sup> The suggestion that appellate courts should, when reviewing administrative action, inquire more searchingly into the findings of administrators than they now do under the "substantial evidence" rule is difficult to reconcile with the practice of those courts in reviewing decisions of trial courts; moreover it would burden appellate courts impossibly unless the number of appellate judges were increased at least tenfold.<sup>45</sup> The truth is that much of the regulation of the affairs of citizens which the complexities of our civilization necessitates calls [fol. 86] for a very considerable use of the administrative device,<sup>46</sup> and that its use must be accompanied by grants

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<sup>42</sup> Such comments have been made concerning the position of the trial judge under modern trial procedure as contrasted with the previous continental procedure when proof was regarded quantitatively according to the age, sex and social position of the witnesses. See Millar, in Englemann, *History of Continental Civil Procedure* (transl. 1927) 41-49.

<sup>43</sup> Cf. dissenting opinion in *Eastern Central Ass'n v. U. S.*, 321 U. S. 194, 215.

<sup>44</sup> Some federal trial judges recently expressed indignation when it was suggested that the proposed rules of procedure in criminal cases should provide for fact-finding by a judge when trying a criminal case without a jury.

<sup>45</sup> Cf. Benjamin, *Administrative Adjudication in The State of New York* (1942) 336-338.

<sup>46</sup> By that device, advantages are gained which are not procurable by the judicial process, including inter alia, preventive action and decisions which citizens can procure in advance of action.

of delegated powers<sup>47</sup> both as to the making of rules and the finding of facts. Complexity is our lot and we should not rail against its inevitable concomitants.<sup>48</sup> Improvement in the procedures of administrative agencies and in their relations to the courts, when they judicially review administrative conduct, is desirable and possible.<sup>49</sup> The phrases "separation of powers" and "a government of laws, and not of men," if properly construed, embody principles of the first importance in a democracy; but if so construed as seriously to cripple effective government, they will lead to democracy's downfall, for, as the Federalist tells us, an ineffective government paves the way to anarchy and thence to despotism.<sup>50</sup> Laws neither execute nor interpret themselves. Men must discharge those functions. Above all what we need is the selection of well-trained, honest, able men, conscientiously obeying the laws, and imbued [fol. 87] with the spirit of democracy, to serve as administrators and on the bench.<sup>51</sup>

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<sup>47</sup> See 257 U. S. xxv-xxvi; Hughes, *Some Aspects of Development of American Law*, 39 N. Y. State Bar Ass'n Report (1916) 266, 269; Root, *Addresses on Citizenship and Government* (1916) 534.

<sup>48</sup> As Puttkammer says (loc. cit. 9), "we have altogether too much of a tendency to try to correct the abuse of administrative discretion by abolishing the discretion."

<sup>49</sup> Some of the expansion of administrative activities probably has resulted from backwardness in improving the fact-finding techniques of the courts. The success of the advisory role played by the S. E. C. in Chapter X cases under the Chandler Act suggests that in other contexts, administrative agencies could be used to better judicial fact-finding without departing substantially from judicial traditions. See *New England Coal & Coke Co. v. Rutland R. R. Co.*, — F. (2d) — note 30 (C. C. A. 2).

<sup>50</sup> *The Federalist* (Earle's ed. 1937) No. 70, p. 454; cf. No. 68, p. 444, and No. 51, p. 337.

<sup>51</sup> "To say that the quality of the people that administer your laws is unimportant, is, to my mind, ridiculous. The heart of the administrative problem is to get good administrators, or in the judicial problem, to get good judges. Now, there are certain laws that we must have to try to mitigate the effect of having bad men, either as judges or

Their selection, however, is not a judicial function. And it is surely not our function in this case to thwart the legislative purpose (whether we like it or not) by so interpreting this statute as to leave it, as to the industry here concerned, a mere bit of worthless printing.

Petitions denied.

L. HAND, *Circuit Judge* (concurring):

The only question which, as I view it, requires discussion is the meaning of § 8(f); for the plaintiffs' objections, based upon the Fifth Amendment, and—as applied to this situation—upon a supposed unlawful delegation of power, have long since been answered in the books. I should have not had any trouble as to § 8(f), had it applied to all wages—those fixed by statute as well as those fixed by “advisory [fol. 88] committees”—indeed, I am not sure that the Administrator would have needed any express grant of power to promulgate the regulation which he did, had the Act been silent. His duty might have included preventing evasions and safeguarding the rates in any event. But, since the power is in terms limited to what I may call “committee,” as opposed to “statutory,” wages, I have had some doubts whether we should construe it to comprise so drastic an exercise as is here in question. Indeed, unless it can be read to cover “statutory” wages, I do not believe that it would justify the proscription of a substantial part of the entire industry; for in that event the purpose we should

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administrators \* \* \* If part of the furor that is aroused about these bills [to establish rules for administrative procedure] could be devoted to efforts to assure good appointments, I think we all would be better off.” Senator O'Mahoney, *loc. cit.*

John Foster Dulles, in the same hearings, said that when he had publicly stated that the administration of any law depended in the last analysis upon the character of the men charged with the duty of administering it, he had been severely criticized “on the ground that that demonstrated I was a Nazi because I believed in a government by men and not a government of laws, and the American system was a government of laws and not of men.”

Cf. Lindsay Rogers, *The Independent Regulatory Commissions*, 52 *Pol. Sc. Q.* (1937) 1, 9-10.

have to ascribe to Congress would be nothing short of absurd. The regulation was promulgated in August, 1943, and at most could cover less than two years, except for the possibility—remote in this industry—that an “advisory committee” might thereafter reduce wages below 40 cents under § 8(e). And yet the regulation will disorganize and make over the industry, break up much family economy, and produce conditions which cannot possibly adjust themselves until after it has itself ceased to exist when by hypothesis all will be free to go back to homework. Not only does every consideration which can support so heroic a remedy apply equally to “statutory” wages, but their exclusion so mutilates the only purpose that could have actuated the regulation, as to leave no intelligible purpose at all.

Even so, I should have had the utmost compunction in disregarding the explicit language with which the section begins, were it not for its legislative history. The grant of power appeared in the Senate bill in its present form, where it was part of an entirely different plan: a Board was to fix all labor standards. There were amendments in the Senate which I shall come back to in a moment; but, when the bill reached the House, the whole scheme was scrapped, and wages were fixed by statute. I do not understand that [fol. 89] in that phase, any power was given to the Administrator to protect the rates against evasion or to safeguard them; reliance being, perhaps, on his implied powers. In Conference a compromise was arranged, and a hybrid resulted: statutory rates were kept, but the Administrator had no power over them except a veto, and “advisory committees” were to fix them within prescribed limits. It was into this new plan, and into § 8, which set it up, that the power, as originally granted to the Administrator in the Senate, was reintroduced. Having had its origin in a plan which allowed wages to be fixed ad hoc, it took its place in that part of the act which still allowed them to be so fixed, though within limits. It was entirely natural that, when so introduced, the power should be thought of as limited to “committee” wages, forgetting its capricious and egregious incidence, if that were done. It does not therefore seem to me an undue liberty to give the section as a whole the meaning it must have had, in spite of the clause with which it begins. Such treatment of a statute needs no apology today, whatever were the scruples of the past. There is no surer way to misread any document than

to read it literally; in every interpretation we must pass between Scylla and Charybdis; and I certainly do not wish to add to the barrels of ink that have been spent in logging the route. As nearly as we can, we must put ourselves in the place of those who uttered the words, and try to divine how they would have dealt with the unforeseen situation; and, although their words are by far the most decisive evidence of what they would have done, they are by no means final.

I have not mentioned the parenthesis, which was interpolated into what has now become § 8(f) while it was in the Senate, and which was deleted when it was restored. This grew up through step by step additions, among which "homework" was one. I think that we should misread it—built up in this way as it was—if we supposed that the [fol. 90] process indicated more than a desire to make sure that the specified details should be included. Indeed, even though the whole parenthesis had been struck out while the original plan remained, I should have put it down to the belief that it was unwise to specify so much, lest the specification be taken as exhaustive. But that did not happen; the section, which had apparently died with the Senate plan, was lifted out of that setting, and was put into the compromise bill as it had stood originally. It would be indeed a far cry to infer from that that all the items which by accretion had made their way into the parenthesis were in this way excised from the Administrator's powers. Indeed, if so—as he argues—he could not even regulate labels, for, although § 11(c) gives him power over records, it does not give him power over these.

Finally, I cannot see that the Puerto Rico and Virgin Island amendment to § 6 stands in the way. When the Act was first passed it was not in it; it remained for two years just as it was. It would be unsafe to interpret the original meaning by an amendment made two years later; certainly, when it was a specific and detailed provision, applicable to islands where the conditions were quite different from those in the continental United States.

*SWAN, Circuit Judge (dissenting):*

These are petitions under section 10 of the Fair Labor Standards Act of 1938, 29 USC § 210, by home workers and employers of home workers in the embroideries industry to

review a wage order of the Administrator which establishes a minimum wage rate of 40 cents an hour and prohibits, with very limited exceptions, home work. No one questions the validity of the minimum wage portion of the order. My brothers hold valid the prohibition of home work. I shall [fol. 91] attempt to state briefly the reasons why I cannot agree with them.

Section 5 of the Act provides for the appointment by the Administrator of industry committees, each such committee being composed of representatives of the public, of employees and of employers in the industry. Section 8 prescribes the duties of the committee and of the Administrator after the committee has filed a report containing its recommendations. Subsection (b) requires that after investigating conditions in the industry the committee "shall recommend to the Administrator the highest minimum wage rates for the industry which it determines . . . will not substantially curtail employment in the industry." Under subsection (c) the committee may recommend classifications within the industry but the wage it recommends must not "substantially curtail employment in such classification," nor give a competitive advantage to any group in the industry. After the committee files a report containing its recommendations the Administrator must give a hearing to interested persons and shall by order carry the recommendations into effect, if he finds that they are lawful and supported by the evidence adduced at the hearing, and, "taking into consideration the same factors as are to be considered by the industry committee," will carry out the purposes of section 8; otherwise he must disapprove such recommendations and again refer the matter to the same or another industry committee for further consideration and recommendation. Subdivision (d). Subdivision (e) provides that no order issued under section 8 shall remain in effect after expiration of the statutory rates specified in section 6. Then follows subdivision (f) under which the Administrator claims his power to prohibit home work. It reads as follows:

"Orders issued under this section shall define the industries and classifications therein to which they are [fol. 92] to apply, and shall contain such terms and conditions as the Administrator finds necessary to carry

out the purposes of such orders, to prevent the circumvention or evasion thereof, and to safeguard the minimum wage rates established therein. \* \* \*

The committee which recommended the 40 cent minimum wage for the embroideries industry made no recommendation as to the abolition or restriction of home work. This issue was never presented to the committee. Had the committee known that the wage it recommended was to be accompanied by such a restriction, which, as Judge Hand well says, "will disorganize and make over the industry, break up much family economy, and produce conditions which cannot possibly adjust themselves" for a considerable period of time, the committee might well have withheld its recommendation of a minimum wage rate lest employment in the industry be substantially curtailed. The Administrator, it is true, has made a finding that employment will not be substantially curtailed. But this finding adds no support to the validity of the order in my opinion. The issue of curtailment of employment by reason of the prohibition of home work was interjected without statutory authority into the hearing held under §8(d). That hearing is to determine whether the committee's recommendations are made in accordance with law, are supported by the evidence, and will carry out the purposes of the section, "taking into consideration the same factors as are required to be considered by the industry committee." As already noted the prohibition of home work was not presented to the committee and consequently was not a factor considered or required to be considered by it. Bearing in mind that under section 8(d) the Administrator must either adopt or reject the recommendations of an industry committee and is given no discretion to modify them, and that such committee is repeatedly admonished to determine that its recommendations will not substantially curtail employment, it appears to me unreasonable to suppose that Congress intended the incidental powers conferred by section 8(f) to authorize the Administrator in his uncontrolled discretion to take action so radical as to alter the whole structure of an industry and cause one-third of the employees engaged therein to become factory workers or to give up their employment. In my opinion "such terms and conditions" as the Administrator finds necessary "to carry out the purposes of the order or

prevent evasion thereof" mean terms and conditions which are truly incidental to administration, that is, requirements as to keeping records, filing reports, etc. And this finds confirmation, I think, in the fact that the Act as finally passed omitted the parenthetical definition which appeared at one stage of the legislative history of section 8(f), namely, "such terms and conditions (including the restriction or prohibition of industrial home work or of such other acts or practices) as the Board finds necessary to carry out the purposes of such order \* \* \*." In my opinion so much of the order as prohibits home work should be set aside.

[fol. 94] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE  
SECOND CIRCUIT

No. 18973

JOSEPHINE GUISEPPI, DOMINICA DE MARCO, ROSA MORICI,  
Anthony Cimilluca, individually and trading as Cimi Embroidery Co.; Simon Federman, individually and trading as Efficiency Novelty Works, and Frank Jannotti, individually and trading as Parisian Art Embroidery, Petitioners,

v.

L. METCALFE WALLING, Administrator of the Wage and Hour Division, United States Department of Labor, Respondent.

This Court having rendered its decision on June 27, 1944, Hon. Thomas W. Swan dissenting, in the above entitled cause holding that the Wage Order for the Embroideries Industry, issued by the Administrator of the Wage and Hour Division, United States Department of Labor, under Section 8 of the Fair Labor Standards Act on August 21, 1943, published in the Federal Register on September 2, 1943, should be affirmed;

It Is Hereby Ordered, Adjudged And Decreed that the said Wage Order for the Embroideries Industry, issued by the Administrator of the Wage and Hour Division, United States Department of Labor, under Section 8 of the Fair Labor Standards Act on August 21, 1943, and pub-

lished in the Federal Register on September 2, 1943, be, and it hereby is, in all respects affirmed.

Dated: New York, N. Y., 27 —, 1944.

Learned Hand, Jerome N. Frank, Circuit Judges.

Filed July 27, 1944.

[Endorsed:] United States Circuit Court of Appeals: Second Circuit. Josephine Guiseppi, et al., v. L. Metcalfe Walling, Administrator, etc., Order. United States Circuit Court of Appeals: Second Circuit. Filed July 27, 1944. Alexander M. Bell, Clerk.

[fol. 95] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE  
SECOND CIRCUIT

No. 18976

MILDRED MARETZO, et al., Petitioners,

v.

L. METCALFE WALLING, Administrator of the Wage and Hour Division, United States Department of Labor, Respondent.

This Court having rendered its decision on June 27, 1944, Hon. Thomas W. Swan dissenting, in the above entitled cause holding that the Wage Order for the Embroideries Industry, issued by the Administrator of the Wage and Hour Division, United States Department of Labor, under Section 8 of the Fair Labor Standards Act on August 21, 1943, published in the Federal Register on September 2, 1943, should be affirmed;

It Is Hereby Ordered, Adjudged And Decreed that the said Wage Order for the Embroideries Industry, issued by the Administrator of the Wage and Hour Division, United States Department of Labor, under Section 8 of the Fair Labor Standards Act on August 21, 1943, and published in the Federal Register on September 2, 1943, be, and it hereby is, in all respects affirmed.

Dated: New York, N. Y., 27 —, 1944.

Learned Hand, Jerome N. Frank, Circuit Judges.

Filed July 27, 1944.

[Endorsed:] United States Circuit Court of Appeals: Second Circuit. Mildred Maretzo, et al., v. L. Metcalfe Walling, Administrator, etc., Order. United States Circuit Court of Appeals: Second Circuit. Filed July 27, 1944. Alexander M. Bell, Clerk.

[fol. 96] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE  
SECOND CIRCUIT

No. 18986

GEMSCO, INC., VANGUARD MILITARY EQUIPMENT CO., S. MARS, INC., Hertz & Company, Tubell & Company, Hilborn-Hamburger, Inc., and G. Hirsch Sons, Inc., Petitioners,

v.

L. METCALFE WALLING, Administrator of the Wage and Hour Division, United States Department of Labor, Respondent.

This Court having rendered its decision on June 27, 1944, Hon. Thomas W. Swan dissenting, in the above entitled cause holding that the Wage Order for the Embroideries Industry, issued by the Administrator of the Wage and Hour Division, United States Department of Labor, under Section 8 of the Fair Labor Standards Act on August 21, 1943, published in the Federal Register on September 2, 1943, should be affirmed;

It Is Hereby Ordered, Adjudged And Decreed that the said Wage Order for the Embroideries Industry, issued by the Administrator of the Wage and Hour Division, United States Department of Labor, under Section 8 of the Fair Labor Standards Act on August 21, 1943, and published in the Federal Register on September 2, 1943, be, and it hereby is, in all respects affirmed.

Dated: New York, N. Y., 27 —, 1944.

Learned Hand, Jerome N. Frank, Circuit Judges.

Filed July 27, 1944.

[Endorsed:] United States Circuit Court of Appeals: Second Circuit. Gemseo, Inc., et al., v. L. Metcalfe Walling, Administrator, etc., Order. United States Circuit Court of Appeals: Second Circuit. Filed July 27, 1944. Alexander M. Bell, Clerk.

{fol. 97] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE  
SECOND CIRCUIT

No. 18984

JOSEPHINE GUISEPPI, et al., Petitioners,  
against

L. METCALFE WALLING, Administrator of the Wage and Hour  
Division, United States Department of Labor, Respond-  
ent.

No. 18985

MILDRED MARETZO, et al., Petitioners,  
against

L. METCALFE WALLING, Administrator of the Wage and Hour  
Division, United States Department of Labor, Respond-  
ent.

No. 18986

GEMSCO, INC., et al., Petitioners,  
against

L. METCALFE WALLING, Administrator of the Wage and Hour  
Division, United States Department of Labor, Respond-  
ent.

It Is Hereby Stipulated And Agreed by and between the  
attorneys for all of the petitioners herein and the attorneys  
for the Administrator of the Wage and Hour Division of  
the United States Department of Labor, that the above en-  
titled proceedings be consolidated and be deemed to be  
[fol. 98] one proceeding as hereinbefore entitled; and it is

Further Stipulated And Agreed that the petitioners  
apply to the United States Circuit Court of Appeals for  
the Second Circuit for an order directing that the record  
on file herein be removed to the Supreme Court of the  
United States, which record shall thereupon be deemed  
to be the record of the said consolidated proceeding and as  
such be forwarded to the Clerk of the Supreme Court of  
the United States except that only the following portions  
of the record shall be printed by the petitioners both for

the purpose of the application of the petitioners herein to the Supreme Court of the United States for a Writ of Certiorari and (if granted) for the purposes of the appeal to the Supreme Court of the United States: The Appendix to the brief of appellants, Gemsco, Inc., et al, and the administrator's Regulations applicable to the employment of Industrial Homeworkers in the Embroideries Industry (pages 140 to 148 inclusive of the Joint Appendix to Briefs of Appellants, Guiseppi, et al, and Maretzo, et al) and pages 7 and 8 of the reply brief submitted on behalf of appellants, Guiseppi, et al, together with the Petitions [fol. 99] for Review herein and the Opinion and Order of the United States Circuit Court of Appeals for the Second Circuit.

In the event that the petitions for certiorari are granted, the full transcript of the proceedings before the Administrator of the Wage and Hour Division of the United States Department of Labor, filed in the Circuit Court of Appeals for the Second Circuit, shall be, and be deemed to be, the record on appeal in the Supreme Court and said record need not be printed, except as hereinabove set forth.

Dated: New York, N. Y., July 27, 1944.

Douglas B. Maggs, Solicitor; Archibald Cox, Associate Solicitor; Louis Sherman, Assistant Solicitor, and Irving Rozen, Regional Attorney, United States Department of Labor, Attorneys for Respondent.

Landau & Friedman, Attorneys for Petitioners-Appellants, Guiseppi, et al.; Brower, Brill & Tompkins, Attorneys for Petitioners-Appellants, Maretzo, et al.; Weisman, Quinn, Allan & Spett, Attorneys for Petitioners-Appellants, Gemsco, Inc., et al.

[Endorsed:] Giuseppe, et al., v. Walling. United States Circuit Court of Appeals, Second Circuit. Filed July 28, 1944. A. M. Bell, Clerk.

[fol. 100] UNITED STATES OF AMERICA, SOUTHERN DISTRICT  
OF NEW YORK

I, Alexander M. Bell, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from I to L and 1 to 227, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Josephine Guiseppi, et al., Petitioners-Appellants, against L. Metcalfe Walling, as Administrator of the Wage and Hour Division, United States Department of Labor, Respondent (And two other cases) as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 31st day of July, in the year of our Lord one thousand nine hundred and forty-four, and of the Independence of the said United States the one hundred and sixty-ninth.

Alexander M. Bell, Clerk. (Seal.)

(3301)

[fol. 252] SUPREME COURT OF THE UNITED STATES, OCTOBER  
TERM, 1944

No. 368

ORDER ALLOWING CERTIORARI—Filed October 16, 1944

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted, limited to the first question presented by the petition for the writ and the case is advanced and assigned for argument on Monday, December 4th next.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 253] SUPREME COURT OF THE UNITED STATES, OCTOBER  
TERM, 1944

No. 369

ORDER ALLOWING CERTIORARI—Filed October 16, 1944

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted, limited to the first question presented by the petition for the writ and the case is advanced and assigned for argument on Monday, December 4th next.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 254] SUPREME COURT OF THE UNITED STATES, OCTOBER  
TERM, 1944

No. 370

ORDER ALLOWING CERTIORARI—Filed October 16, 1944

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted, limited to the first question presented by the

petition for the writ and the case is advanced and assigned for argument on Monday, December 4th next.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

---

Endorsed on cover: File No-. 48,821, 48,822, 48,823. U. S. Circuit Court of Appeals, Second Circuit. Term No. 368. Gemseo, Inc., et al., Petitioners, vs. L. Metcalfe Walling, Administrator of the Wage and Hour Division of the United States Department of Labor. Term No. 369. Mildred Maretzo, et al., Petitioners, vs. L. Metcalfe Walling, Administrator of the Wage and Hour Division of the United States Department of Labor. Term No. 370. Josephine Guiseppi, et al., Petitioners, vs. L. Metcalfe Walling, Administrator of the Wage and Hour Division of the United States Department of Labor. Petition for writs of certiorari and exhibit thereto. Filed August 18, 1944. Term No. 368 O. T. 1944. 369 O. T. 1944. 370 O. T. 1944.



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AUG 18 1944

CHARLES ELMORE GROPLEY  
CLERK

**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1944**

**No. 368.**

**GEMSCO, INC., ET AL.,**

*Petitioners,*

*vs.*

**L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR  
DIVISION OF THE UNITED STATES DEPARTMENT OF LABOR.**

**No. 369.**

**MILDRED MARETZO, ET AL.,**

*Petitioners,*

*vs.*

**L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR  
DIVISION OF THE UNITED STATES DEPARTMENT OF LABOR.**

**No. 370.**

**JOSEPHINE GUISEPPI, ET AL.,**

*Petitioners,*

*vs.*

**L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR  
DIVISION OF THE UNITED STATES DEPARTMENT OF LABOR.**

**PETITION FOR WRITS OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE SECOND CIRCUIT AND BRIEF IN SUP-  
PORT THEREOF.**

**SAMUEL S. ALLAN,  
SEYMOUR D. ALTMARK,**  
*Of Counsel.*

**COLEMAN GANGEL**  
*Of Counsel.*

**SOLOMON S. FRIEDMAN,**  
*Of Counsel.*

**MILTON C. WEISMAN,**  
*Counsel for Petitioners,  
Gemaco, Inc., et al.;*

**WALTER BROWER,**  
*Counsel for Petitioners,  
Maretzo, et al.;*

**SAMUEL J. COHEN,**  
*Counsel for Petitioners,  
Guiseppi, et al.*

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

---

**No. 368.**

GEMSCO, INC., ET AL.,

*Petitioners,*

*vs.*

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR  
DIVISION OF THE UNITED STATES DEPARTMENT OF LABOR.

**No. 369.**

MILDRED MARETZO, ET AL.,

*Petitioners,*

*vs.*

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR  
DIVISION OF THE UNITED STATES DEPARTMENT OF LABOR.

**No. 370.**

JOSEPHINE GUISEPPI, ET AL.,

*Petitioners,*

*vs.*

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR  
DIVISION OF THE UNITED STATES DEPARTMENT OF LABOR.

---

**PETITION FOR WRITS OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE SECOND CIRCUIT.**

---

*To the Honorable Harlan F. Stone, Chief Justice, and the  
Associate Justices of the Supreme Court of the United  
States:*

The petitioners, Josephine Guiseppi, et al., Mildred Maretzo, et al., and Gemsco, Inc., et al., comprising both home-workers and employers in the embroideries industry (R. 2, 8, 23), jointly pray that writs of certiorari issue to review the orders and decrees of the United States Circuit Court of

Appeals for the Second Circuit, filed in the above proceeding on July 27th, 1944 (R. 246-247-248), which orders and decrees affirmed, by a divided Court, the wage order for the embroideries industry, dated August 21st, 1943, issued by the Respondent (R. 34-39).

### **I. Opinions of the Court Below.**

Three separate opinions were rendered by the Court below as to the Administrator's authority to issue a wage order prohibiting the performance of homework in the embroideries industry. Circuit Court Judges Jerome N. Frank and Learned Hand, for different reasons, upheld the Administrator's order (R. 211-241; 241-243), and Judge Thomas W. Swan, in a separate opinion, dissented (R. 243-246).

The opinions have not yet been printed in the Official Reports.

### **II. Summary Statement of Matter Involved.**

The matter involves a wage order issued by the Respondent which (1) approves the forty cent minimum hourly wage rate for the embroideries industry recommended by an industry committee acting under Sections 5 and 8 of the Fair Labor Standards Act of 1938, and (2) in addition, prohibits, with limited exceptions, the employment of homeworkers in the said industry (R. 34-39).

The petitioners, during the entire course of this proceeding, have only challenged the statutory and constitutional authority of the Respondent to include in the said wage order the latter provision relating to the prohibition of homework (R. 42-44).

The prohibition of homework was included in the wage order by the Respondent solely because he found that he could not enforce the minimum wage rate as to the homeworkers employed in the industry (R. 141-142).

The Administrator found that between 8,500 and 12,000 homeworkers located in various parts of the nation and constituting approximately one-third of all the employees in the embroideries industry, will be affected by the terms of this prohibition (R. 84-86). He also found that forty per cent of the employers engaged in the industry depend exclusively upon homeworkers (R. 143-146).

The Administrator's prohibition of homework expires on October 23rd, 1945, when all administrative wage orders automatically become ineffective under Section 8 (e) of the Fair Labor Standards Act.

The petitioners herein filed three separate petitions for review in the Court below pursuant to Section 10 (a) of the Fair Labor Standards Act (U. S. C. Title 29, Section 210 (a)) (R. 1-32). By order of that Court the three petitions were consolidated, and a stay of execution of its order and decree was granted pending the disposition of the petition herein by this Court.

### **III. Jurisdiction of This Court.**

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13th, 1925 (U. S. C. Title 28, Section 347 (a)), and under Section 10 (a) of the Fair Labor Standards Act of 1938 (U. S. C. Title 29, Section 210 (a)).

### **IV. Statute Involved.**

The statute under which the Administrator claims the power to prohibit homework is Section 8 (f) of the Fair Labor Standards Act of 1938 (Act of June 25th, 1938, Chapter 676, Section 8; 52 Stat. 1060; U. S. C. Title 29, Section 208 (f)).

The relevant provision is:

“(f) Orders issued under this section shall define the industries and classifications therein to which they are

to apply, and shall contain such terms and conditions as the Administrator finds necessary to carry out the purposes of such orders, to prevent the circumvention or evasion thereof, and to safeguard the minimum wage rates established therein."

### **V. Questions Presented.**

The following three questions are presented by this proceeding:

1. Is the Administrator empowered by Section 8 (f) of the Fair Labor Standards Act of 1938 to prohibit homework as a "term and condition" of a wage order, notwithstanding the legislative history and the context of the section?

2. If such power is conferred by the statute, was the delegation thereof restrained by adequate standards to effect a constitutional delegation of legislative power?

3. May the Congress, notwithstanding the Fifth Amendment, prohibit the employment of homeworkers under the Commerce Clause solely because of the inability to enforce the minimum wage rate applicable to homeworkers, without regard to the social and economic character of such employment?

### **VI. Reasons for Allowance of Writs.**

1. *The Circuit Court of Appeals has decided an important question of federal law which has not been but should be settled by this Court.*

**A.** The Circuit Court of Appeals for the Second Circuit has construed Section 8 (f) of the Fair Labor Standards Act of 1938 to mean that the Administrator may prohibit industrial homework as a "term and condition" of an administrative wage order. This Court has not yet con-

strued that section of the Act with reference to the Administrator's power to prohibit homework.

The serious consequences of that feature of the wage order which prohibits homework are set forth in the concurring majority opinion of L. Hand, as follows (R. 242):

"And yet the regulation will disorganize and make over the industry, break up much family economy, and produce conditions which cannot possibly adjust themselves until after it has itself ceased to exist, when by hypothesis all will be free to go back to homework."

JUDGE SWAN in his dissenting opinion stated that the action taken by the Administrator was "so radical as to alter the whole structure of an industry and cause one-third of the employees engaged therein to become factory workers or to give up their employment" (R. 245).

The answer to the questions herein presented will affect not only the thousands of employees in the embroideries industry and their employers, but also may affect the rights of homeworkers and their employers in all other industries throughout the United States, wherein homework is practiced as a method of industrial production. Indeed, the decision of the Court below as to the scope of the Administrator's powers under Section 8 (f) may be applied by the Administrator as a precedent for prohibiting other occupations, industries and activities wherein the enforcement of the wage order is considered by him to be unattainable.

The public importance of the question is therefore obvious; and in such case, where an interpretation of an important provision of a federal statute and the powers of a federal Administrator thereunder are involved, and where a decision with regard to its enforcement constitutes a precedent of general application, this Court will grant a

writ of certiorari. *Del Vecchio v. Bowers*, 295 U. S. 281, 285.

**B.** The decision of the Court below also involves the question, which has not been decided by this Court, whether the Administrator may prohibit homework in those industries where the minimum wage rate is fixed by Section 6 of the Act ("statutory wages") and not by administrative wage orders under Section 8 ("committee wages").

JUDGE L. HAND stated that his ultimate decision that Section 8 (f) conferred power on the Administrator to prohibit homework in connection with "committee wages" as a "term and condition" of a wage order, was based on his determination that Section 8 (f), notwithstanding that it was expressly limited to "Orders issued under this section", also conferred the power to prohibit homework in connection with "statutory wages" established by Section 6. He said, "Indeed, unless it can be read to cover 'statutory wages', I do not believe it would justify the proscription of a substantial part of the entire industry" (R. 241-242).

This unsettled question of the Administrator's power to prohibit homework with respect to the mandatory statutory wage rates established by Section 6 is of importance in the administration of the Fair Labor Standards Act and should be determined by this Court.

**C.** The Circuit Court's decision involved a consideration of the Commerce Clause and the Fifth Amendment. In sustaining the prohibition of homework solely because of the Administrator's inability to maintain the minimum wage rate as to homeworkers, and not because of the social or economic aspects thereof (R. 81), the Court below, in effect, held that the prohibition of homework did not constitute an unreasonable exercise of the power con-

ferred by the Commerce Clause nor a violation of the Fifth Amendment. The precise question as to whether an occupation may be prohibited solely because of the inability to enforce a law applicable thereto, without regard to the social or economic character of such occupation, has not been but should be settled by this Court.

2. *The Circuit Court of Appeals has decided a federal question in a way probably in conflict with the applicable decisions of this Court.*

A. AS TO STATUTORY CONSTRUCTION. In the course of the legislative history of the Act, Congress rejected proposed amendments containing provisions that administrative orders thereunder may contain "terms and conditions (including the restriction and prohibition of industrial homework or of such other acts or practices)", and omitted this parenthetical clause from the Act as finally enacted (Congressional Record, Volume 83, Part 7, pages 7373, 7376—Section 8 (6); Congressional Record, Volume 82, Part 2, pages 1511, 1514, 1574, 1583—Section 9 (6)). The provision was omitted, notwithstanding that the Secretary of Labor had urged that the Act contain a specific provision prohibiting homework. (Joint hearings before the Committee on Education and Labor of the Senate, and the Committee on Labor, House of Representatives, 75th Cong., 1st Session S. 2475 and H. R. 7200, at page 184.)

The Court below, in refusing to consider the deletion of the above mentioned parenthetical phrase as indicating Congressional intent to withhold the power therein mentioned, failed to follow the rule established by this Court in *Cudahy Packing Co., Ltd. v. Holland, Administrator of the Wage and Hour Division*, 315 U. S. 357, 366; *Maurer v. Hamilton*, 309 U. S. 598, 613; *U. S. v. Delaware & Hudson Co.*, 213 U. S. 366, 414; *Pennsylvania Railroad Co. v. International Coal Mining Co.*, 230 U. S. 184, 198.

This Court, in the above cases, held that the rejection by Congress of a provision of proposed legislation, and the omission of such provision from the final enactment, indicates legislative intent that the general words of the enacted statute shall not be deemed to include the effect of the rejected provision.

Insofar as the Circuit Court's ruling was based on the contention that the above mentioned parenthetical phrase relating to the prohibition of homework was omitted from the Fair Labor Standards Act to prevent the examples given in the parenthetical phrase from being taken as an "exhaustive" list of the powers granted, it is contrary to the rulings of this Court in *Phelps Dodge Corp. v. National L. R. B.*, 313 U. S. 177, 189 and *Fed. Land Bank of St. Paul v. Bismark Lumber Co.*, 314 U. S. 95, 100.

**B. AS TO DELEGATION OF LEGISLATIVE POWER.** The Circuit Court's ruling that the powers conferred by Section 8 (f) were constitutionally delegated is contrary to the decisions of this Court in *Panama Refining Co. v. Ryan*, 293 U. S. 388, 417, 418, 430; *Schechter v. U. S.*, 295 U. S. 495, 529-530, 539-540, 573. Those cases clearly held that a delegation of power unrestrained as to its exercise by adequately prescribed standards is unconstitutional. The Act does not prescribe the standards to be followed in the exercise of the powers delegated by Section 8 (f).

Circuit Court Judge FRANK refused to follow these cases. His opinion, stating that "these two cases must be considered exceptional, restricted to their particular or very similar facts" (R. 227), virtually attempts to overrule these decisions of this Court.

### **Conclusion.**

It is respectfully submitted that this petition for writs of certiorari to review the orders and decrees of the United

States Circuit Court of Appeals for the Second Circuit,  
should be granted, and the orders and decrees of the Circuit  
Court should be reversed.

MILTON C. WEISMAN,  
*Counsel for Petitioners,*  
*Gemsco, Inc., et al.*

SAMUEL S. ALLAN,  
SEYMOUR D. ALTMARK,  
*Of Counsel.*

WALTER BROWER,  
*Counsel for Petitioners,*  
*Maretzo, et al.*

COLEMAN GANGEL,  
*Of Counsel.*

SAMUEL J. COHEN,  
*Counsel for Petitioners,*  
*Guiseppi, et al.*

SOLOMON S. FRIEDMAN,  
*Of Counsel.*

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

---

**No. 368.**

GEMSCO, INC., ET AL.,

*Petitioners,*

*against*

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR  
DIVISION, UNITED STATES DEPARTMENT OF LABOR.

**No. 369.**

MILDRED MARETZO, ET AL.,

*Petitioners,*

*against*

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR  
DIVISION, UNITED STATES DEPARTMENT OF LABOR.

**No. 370.**

JOSEPHINE GUISEPPI, ET AL.,

*Petitioners,*

*against*

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR  
DIVISION, UNITED STATES DEPARTMENT OF LABOR.

---

## BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI.

---

### I. Opinions of Court Below.

The majority opinion of United States Circuit Court Judge Frank is printed (R. 211-241). The concurring opin-

ion of Judge L. Hand is printed (R. 241-243). The dissenting opinion of Judge Swan is printed (R. 243-246).

The opinions have not yet been printed in the official reports.

## **II. Jurisdiction.**

The statutory provisions sustaining the jurisdiction of this Court to review the decision of the United States Circuit Court of Appeals for the Second Circuit are Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (U. S. C. Title 28, Section 347 (a)), and Section 10 (a) of the Fair Labor Standards Act of 1938 (U. S. C. Title 29, Section 210 (a)).

### **Date of Entry of Order and Decree to Be Reviewed.**

The orders and decrees to be reviewed was filed on July 27, 1944 (R. 246-247-248). The petition is timely within the requirements of Section 243 of the Judicial Code of the United States (U. S. C. Title 28, Section 350).

## **III. Statement of the Case.**

A summary statement of the facts has already been made in the preceding petition for certiorari, pages 2-3, which is hereby adopted and made a part of this brief.

## **IV. Specification of Errors to Be Urged.**

The United States Circuit Court of Appeals for the Second Circuit erred:

(1) In entering its order and decree affirming in all respects the wage order of the Respondent which prohibited, with limited exceptions, the performance of homework in the embroideries industry.

(2) In ruling that Section 8 (f) of the Fair Labor Standards Act of 1938 empowered the Administrator to pro-

hibit industrial homework in the embroideries industry as a "term and condition" of a wage order.

(3) In ruling that the power delegated to the Administrator by Section 8 (f) was restrained by adequate standards to effect a constitutional delegation of legislative power.

(4) In ruling that the prohibition of homework, imposed solely because of the Administrator's inability to enforce the minimum wage rate as to homeworkers, does not violate due process.

## **V. Summary of Argument.**

A. The Fair Labor Standards Act of 1938 did not, either expressly or impliedly, confer upon the Administrator the authority to make the wage order herein prohibiting homework.

B. If the Act, by implication, intended to confer unrestrained power on the Administrator to prohibit industrial homework, there was an unconstitutional delegation of legislative power.

C. The prohibition of industrial homework solely because of the Administrator's inability to enforce the wage rate as to homeworkers violates the Fifth Amendment of the Constitution.

## **VI. Argument.**

A. The Fair Labor Standards Act of 1938 did not, either expressly or impliedly, confer upon the Administrator the authority to make the wage order herein prohibiting homework.

(1) The legislative history of the Act established Congressional intent to withhold from the Administrator the

power to prohibit homework. The decision of the Court below to the contrary is in conflict with the applicable decisions of this Court.

The respondent claims the power to prohibit homework as a "term and condition" of his wage order by virtue of Section 8 (f) (R. 73). The legislative history of this section clearly indicates that Congress withheld this power from the Administrator.

### **Brief Statement of Legislative History of Section 8 (f).**

The section of the proposed amended Senate Bill #2475, from which Section 8 (f) was derived, originally read as follows (Congressional Record, Vol. 83, Part 7, Pages 7373, 7376—Section 8(6); Vol. 82, Part 2, Pages 1511, 1514; 1574, 1583—Section 9(6)):

"A labor standard order . . . (6) shall contain such terms and conditions (including the restriction or prohibition of industrial homework or of such other acts or practices) as the Board \* finds necessary to carry out the purposes of such order, to prevent the circumvention or evasion thereof, or to safeguard the fair labor standards therein established."

The amendment to Senate Bill #2475 containing the above parenthetical provision was rejected by the House Committee on Labor (Congressional Record, Vol. 83, Part 7, Page 7378, last paragraph, first column; 7373, first paragraph, second column); was rejected by the House of Representatives (Congressional Record, Vol. 83, Part 7, Page 7389); and in the final measure the comparable provision with respect to wage orders, namely, Section 8 (f), omitted the parenthetical clause "(including the restriction and

\* Section 9(6) of the Amendment reads "Administrator" instead of "Board."

prohibition of homework \* \* \*)” as a modifier of the words “terms and conditions”.

This parenthetical clause authorizing the prohibition of homework was rejected by Congress, notwithstanding that Secretary of Labor Perkins had urged its inclusion in the Act in express terms. (Printed testimony of Joint Committee Hearings, Op. Cit. Pages 184, 195.)

**The Decision of the Court Below Is Inconsistent with the  
Decisions of This Court.**

The ruling of the Court below that rejection of the parenthetical clause relating to homework and its exclusion from the Fair Labor Standards Act of 1938 did not indicate the intention of Congress to withhold from the Administrator the power to prohibit industrial homework is in conflict with the following applicable decisions: *Cudahy Package Co. Ltd. v. Holland*, 315 U. S. 357, 362 (fn. 3), 366; *United States v. Delaware & Hudson Co.*, 213 U. S. 366, 414; *Pennsylvania R. R. Co. v. International Coal Mining Co.*, 230 U. S. 184, 198; *Boston Sand & Gravel Co. v. United States*, 278 U. S. 41, 48; *Maurer v. Hamilton*, 309 U. S. 598, 613.

According to the well established rule of statutory construction established by this Court in the above cases the rejection or exclusion of provisions by Congress in the final enactment of legislation indicates its intention that the enacted provisions be not deemed to include the effect of the provisions rejected. See *Keystone Mining Co. v. Gray* (CCA 3d) 120 Fed. (2d) 1, 9-10.

Mr. Chief Justice Stone, in *Cudahy Packing Co. Ltd. v. Holland*, supra, pointed out that a provision of the same Senate Bill #2475 permitting delegation of the Administrator's power of subpoena was excluded from the final enactment. The Chief Justice stated, at page 366 of the

Opinion, that the Congressional intent to withhold from the Administrator authority to delegate this power was indicated "by the legislative history of the present Act which shows that the authority to delegate the subpoena power was eliminated by the Conference Committee from the bills which each House had adopted".

In *United States v. Delaware & Hudson Co.*, 213 U. S. 366, 403-404, 414 Mr. Justice White ruled that the words "any interest, direct or indirect" in the commodities clause of the Hepburn Act of 1906, prohibiting railroad companies from transporting commodities "in which it may have an interest, direct or indirect" did not embrace stock ownership by a railroad in a corporation producing coal, since an amendment in specific terms causing the clause to embrace stock ownership was rejected by Congress in the course of its legislative history.

Judge Frank stated in his opinion in the Court below that the omission of the parenthetical clause which would have expressly conferred upon the Administrator the power to prohibit homework as a "term and condition" of a wage order, did not indicate an intent to eliminate such power from Section 8 (f) because the Conference report did not explain the reason for the omission (R. 221). The above decisions of this Court, however, clearly indicate that the very fact of such omission bespeaks the legislative design to exclude the power which the omitted provision would have conferred.

Judge L. Hand suggested a different explanation for the omission of the parenthetical clause. He attributes the omission solely to draftsmanship. He ascribes the omission to a desire to prevent the specifications within the parentheses from being taken as exhaustive and as limiting the generality of the words "terms and conditions" (R. 243).

The parenthetical phrase "including the restriction and prohibition of industrial homework" contained in the rejected amendment to Senate Bill #2475, if left in the Act, would not have limited the generality of the powers previously conferred, under the decisions of this Court in *Phelps Dodge Corp. v. N. L. R. B.*, 313 U. S. 177, 189, and in *Federal Land Bank of St. Paul v. Bismark*, 314 U. S. 95, 100. In the latter case, Mr. Justice Murphy said "the term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle." Consequently, the suggestion made by Judge Hand in the Court below that the phrase was omitted "lest the specifications be taken as exhaustive" must necessarily fall. The expedient of employing the phrase "without limiting the generality of the foregoing" was also available to an overcautious draftsman.

**(2) The context of Section 8 (f) indicates that Congress did not grant authority to the Administrator to prohibit industrial homework as a "term and condition" of a wage order.**

(a) The statutory minimum wage rates ("statutory wages") fixed by Section 6 of the Act become operative without the issuance of a wage order. The Administrator cannot prohibit homework as to "statutory wages" since there is no wage order to which he might attach "terms and conditions." Section 8 (f) expressly limits the Administrator's power to make "terms and conditions" to "Orders issued under this section." To interpret the words "terms and conditions" in Section 8 (f) as including the power to prohibit homework would therefore lead to the absurd, unfair and untenable conclusion that the Administrator has power to prohibit homework in those industries where the minimum wage rate is established

by wage order, although he clearly may not prohibit homework in those industries where the minimum wage rate is automatically established by Section 6.

Furthermore, in accordance with Section 8 (e), the Administrator's wage order prohibiting homework will expire on October 23, 1945. It would, therefore, be absurd to assume that Congress intended that the Administrator could make so disruptive but temporary a regulation as the prohibition of homework would entail (R. 241-242).

Judge L. Hand frankly admitted that unless Congress gave the Administrator power to prohibit homework with respect to "statutory wages," it would be absurd to conclude that Congress gave him such power as to "committee wages" (R. 241-242). He stated that he would disregard the explicit language of Section 8 (f) which confines the Administrator's power to make terms and conditions to "Orders issued under this section," and would hold it applicable to Section 6. This disregard of the precise and express language of the statute establishes the unsoundness of his decision.

Judge Frank disagreed with Judge Hand's contention that there was justification for disregarding the explicit language of Section 8 (f) and holding it applicable to the statutory wage rates established by Section 6. Judge Frank said that if the Act were inconsistent in giving the Administrator power to prohibit homework as to "committee wages" but not as to "statutory wages" that is an inconsistency which must be accepted (R. 223-224). In ruling that in spite of this inconsistency Section 8 (f) gave the Administrator power to prohibit homework as to "committee wages," Judge Frank disregarded the well established rule of statutory construction that a statute must be interpreted to avoid inconsistency, absurdity, and unequal or unfair results.

(b) The Act, in dealing with other labor practices in addition to the minimum wage rate, did so in specific terms, for example, child labor (Section 3 (l) of the Act). The express mention of child labor excludes the inference that the practice of homework was impliedly intended to be regulated or prohibited by the Act.

(c) The phrase "without substantially curtailing employment" recurs in Section 8 (a), (b), (c), (e) and by reference, in Section 8 (d), as a limitation on the powers therein conferred. Section 8 (f), however, does not contain this phrase. In view of its repeated and express mention in the other subdivisions of Section 8, it may not be assumed that the phrase is implied as a condition to the exercise of the powers conferred by Section 8 (f).

Consequently, the words "terms and conditions" were not intended to include the prohibition of homework. Certainly if so drastic an act were contemplated, as embraced in the words "terms and conditions," the powers of the Administrator would have been limited by the express limitation that the terms and conditions should be such as not to "substantially curtail employment." The absurd result of the Administrator's interpretation of Section 8 (f) is that the industry committee and the Administrator may not establish a wage rate if the wage rate curtails employment, but he may, as a "term and condition" of a wage order, prohibit homework even though such prohibition would in fact curtail employment. This absurdity is emphasized by the well known purpose of the Act—to prevent widespread unemployment. The words "terms and conditions," therefore, as used in Section 8 (f) may not be interpreted as including the drastic power of prohibiting homework.

**B. If the Act, by implication, intended to confer unrestrained power on the Administrator to prohibit industrial**

homework, there was an unconstitutional delegation of legislative power.

The only standard prescribed in the Act applicable to an exercise of the power conferred by Section 8 (f) thereof, is the requirement that the "terms and conditions" of a wage order be such as the Administrator finds necessary for its enforcement.

The inadequacy of the standard is apparent. The Act does not define or prescribe the circumstances upon which the Administrator must predicate his conclusion that the "terms and conditions" are necessary for enforcement of the wage order; nor is there a definition or measure of the extent of violation, "evasion or circumvention" which must exist in order to warrant the adoption of the so-called "terms and conditions".

For example, must twenty, fifty or one hundred percent of the firms in an industry be in violation to warrant the Administrator's incorporating a prohibition as a "term and condition" of a wage order. Similarly, for how short or long a period of time need violation be found to exist to authorize the use of the claimed power?

To further illustrate the inadequacy of standards, reference is made to the Administrator's annual reports to Congress for the fiscal years 1941 and 1943. There he reported that routine inspections by his department of varied industries revealed that:

of 23,431 establishments inspected in 1941, there were 71% found to be in violation of the Act (Annual Report for Fiscal year ending June 30th, 1941, page 106);

of 42,056 establishments inspected in 1943 in approximately 60 industries, there were 65% found to be in violation of the Act (Annual Report for Fiscal year ending June 30th, 1943, page 34).

These inspections did not involve homework establishments and were made as a routine departmental procedure not based on complaints; hence they are a valid indication of the extent of violations of the Act which exist generally.

The sole standard of necessity prescribed in the Act does not guide the Administrator in determining which of the industries mentioned in the above reports are to be subjected to an order of prohibition. Obviously this determination is relegated to the unrestrained discretion of the particular Administrator who may chance to hold the office when the power is exercised.

Such delegation of power comes within the condemnation of the decisions in *Panama Refining Co. v. Ryan*, 293 U. S. 388, 417, 418, 430 and *Schechter v. U. S.*, 295 U. S. 495, 529-530, 537, 539-540, as an unfettered delegation of power.

These cases have not been overruled or limited in their application, the decision of Circuit Court Judge Frank to the contrary notwithstanding. In fact the *Schechter* case, supra, was cited and considered by this Court as recently as March 27, 1944 in the case of *Yackus v. U. S.*, 64 Sup. Ct. 660, 667.

The absence of adequate standards in Section 8 (f) can not be remedied by applying to it the declared policies of Section 2 and the standards prescribed in Section 8, as suggested by Judge Frank in the Court below. This is so because there is no legislative command that the Administrator comply with the standards prescribed in Section 8 or the policies or objectives specified in Section 2 as a prerequisite to exercise of power by him under Section 8.

This Court, in *Opp Cotton Mills, Inc. v. Administrator*, 312 U. S. 126, 144 said:

"The mandate of the Constitution that all legislative powers granted 'shall be vested' in Congress has never been thought to preclude Congress from resorting to the aid of administrative officers or boards as

fact-finding agencies whose findings, made in conformity to previously adopted legislative standards or definitions of Congressional policy, have been made *prerequisite* to the operation of its statutory command. The adoption of the declared policy by Congress and its definition of the circumstances in which its command is to be effective, constitute the performance, in the constitutional sense, of the legislative function."

**C. The prohibition of industrial homework, solely because of the Administrator's inability to enforce the wage rate as to homeworkers, violates the Fifth Amendment of the Constitution.**

Petitioners question the power of Congress itself to prohibit homework solely because of inability to enforce the wage rate.

Petitioners recognize the general rule that the power of Congress over interstate commerce is complete in itself and acknowledges no limitations other than those prescribed in the Constitution. *U. S. v. Wrightwood Dairy*, 315 U. S. 110, 119; *Wickard v. Filburn*, 317 U. S. 111, 124.

Where exercise of the power under the Commerce Clause invades the rights protected by the Fifth Amendment, the invasion will be sustained unless the exercise of such power has no real and substantial relation to the object sought to be attained, *North American v. Securities & Exchange*, 135 Fed. (2d), 148, 154 (cert. granted 318 U. S. 750) or is arbitrary or unreasonably discriminatory. *Currin v. Wallace*, 306 U. S. 1, 14.

In the instant case, the prohibition of homework would frustrate the very objective of the Act, namely, the safeguarding of a minimum wage rate for homeworkers as well as for other employees intended to be benefited by the Act.

The determination in the present case as to whether the prohibition of homework is arbitrary and unreasonably discriminatory must be made in the light of the Administrator's annual report of 1943 (Annual Report, Wage and Hour and Public Contract Division, U. S. Department of Labor, For the Fiscal Year Ending June 30th, 1943, page 34). There, he reported that 65% of the establishments in sixty industries voluntarily inspected by him were found to be in violation of the Act. Homework establishments were not involved in this inspection. From this report, it appears that there is a substantial inability to enforce the Act as to industry in general.

Imposing a prohibition as to one industry because of an inability to enforce a minimum wage rate therein, when the same inability to enforce prevails in sixty industries to which prohibition has not been applied, is obviously unreasonable discrimination.

Since the Administrator acknowledged that he was not concerned with the economic or social aspects of homework (R. 81), the Administrator may not now justify the prohibition on social or economic grounds.

Consequently, since the prohibition cannot be justified on social or economic grounds, and since it involves unreasonable discrimination, and its exercise will frustrate the very purpose of the Act, it should be declared to be an improper invasion of the rights safeguarded by the Fifth Amendment.

### **Conclusion.**

It is respectfully submitted that the petition herein for writs of certiorari to review the orders and decrees of the United States Circuit Court of Appeals for the Second Circuit should be granted, and that the said orders and decrees be reversed, and that the Wage Order of the Respond-

ent be modified by setting aside those provisions thereof which prohibit and restrict homework.

Respectfully submitted,

MILTON C. WEISMAN,  
*Counsel for Petitioners,*  
*Gemsco, Inc., et al.*

SAMUEL S. ALLAN,  
 SEYMOUR D. ALTMARK,  
*Of Counsel.*

WALTER BROWER,  
*Counsel for Petitioners,*  
*Maretzo, et al.*

COLEMAN GANGEL,  
*Of Counsel.*

SAMUEL J. COHEN,  
*Counsel for Petitioners,*  
*Guiseppi, et al.*

SOLOMON S. FRIEDMAN,  
*Of Counsel.*

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**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1944**

**No. 368**

**GEMSCO, INC., ET AL.,**

*Petitioners,*

*vs.*

**L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR  
DIVISION OF THE UNITED STATES DEPARTMENT OF LABOR**

**No. 369**

**MILDRED MARETZO, ET AL.,**

*Petitioners,*

*vs.*

**L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR  
DIVISION OF THE UNITED STATES DEPARTMENT OF LABOR**

**No. 370**

**JOSEPHINE GUISEPPI, ET AL.,**

*Petitioners,*

*vs.*

**L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR  
DIVISION OF THE UNITED STATES DEPARTMENT OF LABOR**

**ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

**BRIEF FOR PETITIONERS**

**SEYMOUR D. ALTMARK,**  
*Of Counsel.*

**COLEMAN GANGL,**  
**ILIO ORLEANS,**  
*Of Counsel.*

**SOLOMON S. FRIEDMAN,**  
**MYRON P. GORDON,**  
*Of Counsel.*

**SAMUEL S. ALLAN,**  
*Counsel for Petitioners*  
**Gemaco, Inc., et al.**

**WALTER BROWER,**  
*Counsel for Petitioners*  
**Maretzo, et al.**

**SAMUEL J. COHEN,**  
*Counsel for Petitioners*  
**Guiseppi, et al.**

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# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 368

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*vs.*

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ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE SECOND CIRCUIT

## BRIEF FOR PETITIONERS

### Opinions of the Court Below

The opinions of the Circuit Court of Appeals for the Second Circuit are reported in 144 F. (2d) 608 and are printed R. 189-246.

## **Jurisdiction**

The orders and decrees of the Circuit Court of Appeals were entered July 27, 1944 (R. 224-226). The joint petition for writs of certiorari was filed August 18, 1944, and was granted October 16, 1944. The jurisdiction of this court rests on Sec. 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A. Sec. 347 (a)), and on Sec. 10 (a) of the Fair Labor Standards Act of 1928 (29 U. S. C. A. Sec. 210 (a)).

## **Question Presented**

Is the Administrator empowered by Section 8 (f) of the Fair Labor Standards Act of 1938 to prohibit the performance of home work by including the prohibition as a "term and condition" of a wage order which establishes a minimum wage rate?

## **Statute Involved**

The statute directly involved is Section 8 (f) of the Fair Labor Standards Act of 1938 (52 Stat. 1060; 29 U. S. C. A. Sec. 208(f)).

The relevant provision is:

"(f) Orders issued under this section shall define the industries and classifications therein to which they are to apply, and shall contain such terms and conditions as the Administrator finds necessary to carry out the purposes of such orders, to prevent the circumvention or evasion thereof, and to safeguard the minimum wage rates established therein."

## **Statement**

### **A. FACTS**

The petitioners Gemsco, Inc., et al., Mildred Maretzo, et al., and Josephine Guiseppi, et al., comprise both home

workers and employers in the embroideries industry (R. 2, 8, 23). This industry produces primarily for manufacturers of apparel and apparel accessories (R. 76).

Home work in the various branches of the industry (R. 37, 76) is distributed directly to home workers by regular embroidery manufacturers and contractors (R. 80-81).<sup>1</sup> These concerns supply the workers with materials, designs, cloth, etc. (R. 86).

Approximately forty per cent of the employers engaged in the industry depend exclusively upon home workers (R. 132). There are between 8,500 and 12,000 home workers constituting approximately one-third of all the employees in the embroideries industry (R. 79); but about two-thirds of the embroiderers in the military and naval insignia branch of the industry are home workers (R. 157, 158), and most of them earn at least 68 cents per hour (R. 159). There was evidence that the earnings of many home workers in certain other branches of the industry also exceeded the minimum wage rate (R. 105) as well as that piece rates for certain operations in the industry are high enough to yield the minimum (R. 104, 107).

The reasons stated by home workers for their preference for home work over factory work were included in the record. They are the necessity of caring for children and aged parents, household duties, ill health, age, distance of residence from factory, etc. (R. 141, 143, 158); but the Administrator would not accept their testimony that they would not work in factories as furnishing a sound basis for predicating their actual conduct when faced with actual

---

<sup>1</sup> The facts stated under this heading include those which were found by the Administrator (R. 38-155) and which appeared in evidence and were uncontradicted. Bearing in mind the limited nature of the question presented, no attempt is made to summarize the 1,691 pages of the transcript of the hearings and the voluminous exhibits and reports (R. 40). In view of the limited nature of judicial review of administrative proceedings, the findings of the Administrator were not, and are not now, disputed.

prohibition of home work (R. 143-144). He found that the effect of abolishing home work would result in increased productivity by fewer factory workers doing the same work as the home workers (R. 143, 150-151) and concluded that the abolition of home work would result in "no substantial curtailment of operation." (R. 153)<sup>2</sup>

The Administrator included the prohibition of home work in the wage order solely because he found that he could not enforce the minimum wage rate as to home workers employed in the industry, largely because of the very nature of home work (R. 107, 108, 114, 130).<sup>3</sup> The difficulty of attaining effective enforcement of the minimum wage rate is not an exclusive characteristic of industries employing home workers. The Annual Report of the Administrator of the Wage and Hour Division for the fiscal year ending June 30, 1943, at page 34, states that of 42,056 establishments inspected in 1943 in approximately sixty industries, 65% were found to be in violation of the Act. His Annual Report for the fiscal year ending June 30, 1941, at page 106, indicated that 71% of the establishments inspected were in violation of the Act. These inspections did not involve home work establishments and were made as a routine departmental procedure not based on complaints.

#### B. ADMINISTRATIVE PROCEEDINGS

On June 6, 1942, the Administrator, pursuant to Sections 5 and 8 of the Fair Labor Standards Act of 1938, appointed an Industry Committee for the embroideries industry to

<sup>2</sup> N.B. The phrase used in Sec. 8 (a) (b) (c) and (e) and inferentially in (d) as the guide for administrative action is "without substantially curtailing employment". An inspector of the Wage and Hour division, testifying for the Administrator, said that in the case of nine embroidery firms which discontinued home work "156 employees were performing operations formerly done by 241 home workers" (R. 143).

<sup>3</sup> The Administrator found that industrial home work as an economic and social problem was neither new nor confined to the embroideries industry (R. 75).

recommend minimum wage rates for all employees of that industry subject to the Act. The Industry Committee, after investigation, filed its report with the Administrator recommending a minimum wage rate of 40 cents an hour (R. 38). The Industry Committee made no recommendation as to the prohibition of home work, nor did it consider the question.

In November 1942, public hearings were held by the Administrator (R. 39-40), and on August 21, 1943 the Administrator issued his findings and opinion (R. 38-155) and the wage order now under review (R. 34-37). The wage order (1) approves the Industry Committee's recommendation of the 40 cent minimum hourly wage rate, and (2) in addition prohibits, with limited exceptions,<sup>4</sup> the employment of home workers in the said industry (R. 35-36). The petitioners, during the entire course of the proceedings, endorsed the Industry Committee's recommendation of a 40 cent per hour minimum wage rate and challenged only the statutory authority of the Administrator to include in the wage order the provision relating to the prohibition of home work (R. 40).

The Administrator, in his "Findings and Opinion," concluded that labor conditions in industrial home work are not susceptible to regulation (R. 110), because of the difficulty of home work inspection (R. 116-117), because the conditions under which home work is performed are largely outside the control of employers (R. 116), and because piece rates cannot be fixed to yield the minimum wage (R. 89-90, 130). He found substantial violation of record keeping and minimum wage provisions in the industry (R. 113, 106-107). In addition, he found that adjustment to factory work could be made without undue hardship upon most home workers and home work employers (R. 137).

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<sup>4</sup> The Administrator stated "relatively few home workers will be eligible to continue home work under this exception" (R. 153).

After the Administrator issued his findings and made the order herein, the petitioners filed petitions in the Circuit Court of Appeals for the Second Circuit seeking a review of the order and to have it set aside (R. 1-32). On the 27th day of June, 1944, the Circuit Court handed down its opinion affirming the order (R. 189-224).<sup>5</sup> On the 27th day of July, 1944, the orders and decrees herein were entered in accordance with the opinion.

### **Assignment of Errors**

The Circuit Court of Appeals erred:

(1) In entering its orders and decrees affirming in all respects the wage order of the Administrator, which prohibited, with limited exceptions, the performance of home work in the embroideries industry.

(2) In ruling that Section 8 (f) of the Fair Labor Standards Act of 1938 empowered the Administrator to prohibit industrial home work in the embroideries industry as a "term and condition" of a wage order.

### **Summary of Argument**

#### **I**

The narrow question presented is whether the provision of the Administrator's order which prohibits home work is an authorized "term and condition" of a wage order within the meaning of Sec. 8 (f) of the Fair Labor Standards Act. Our conclusion, that the power to prohibit home work as one method of enforcing the minimum wage established by his order was withheld from the Administrator, must be reached whether we seek the answer to the question by considering the broad purposes of the statute, the mis-

<sup>5</sup> Three separate opinions were rendered by the Court below. Frank, J. and L. Hand, J., for different reasons, upheld the Administrator's order (R. 189-219; 219-221), and Swan, J., dissented (R. 221-224).

chief which gave rise to it, and the remedy prescribed therefor (cf. Max Radin, *A Short Way With Statutes*, 56 *Harv. L. R.* 388), or whether we approach the task of discovering the meaning of the statute by employing the materials pertinent to construction to which resort has always been had by the Courts in ascertaining the meaning and scope of legislation (cf. James M. Landis, *A Note on Statutory Interpretation*, 43 *Harv. L. R.* 886; Richard R. Powell, *The Construction of Written Instruments*, 14 *Indiana L. J.* 199, 309, 324).

While the broad aim of the Fair Labor Standards Act and related progressive legislation is to present a solution to the problem of unemployment by increasing wages and the earning power of workers generally, nevertheless the immediate aim of the Fair Labor Standards Act is to regulate wages and hours directly without dealing with all the factors, such as home work, indirectly involved in the maintenance of wage rates. The weapons furnished by Congress for the arsenal of enforcement of wage and hour provisions are criminal prosecution, injunction and civil liability.

The legislative design to limit the scope of the Act to the fixing of minimum wage rates and maximum hours and regulating child labor was clearly expressed by the sponsor of the measure in the committee reports and in Congress; it was also clearly indicated when the conference which reported the measure as finally enacted deliberately deleted a Senate amendment to the Bill which would have in express terms given to the Administrator the power to prohibit home work as a "term and condition" of a wage order. This deletion was made notwithstanding the fact that the Secretary of Labor had requested the inclusion of a provision giving the Administrator this power in express terms. The limitation of the scope of the Act was clearly expressed by the entire course of the legislation in Congress.

The function of the legislative branch of Government to enact experimental social legislation is now clearly recognized; but to disregard the limitations placed by Congress on the extent of the experiment is conducive neither to a responsible exercise of the legislative function nor to proper cooperation between the legislative and administrative branches of Government.<sup>6</sup>

The Administrator asserts his authority to prohibit home work by virtue of Sec. 8 (f) (R. 67). The deliberate deletion (from Section 9 (6) of the bill S.2475 from which Sec. 8 (f) was derived) of the parenthetical clause "(including the restriction or prohibition of industrial home work or of such other acts or practices)" after the words "terms and conditions" is, under well established judicial decisions, persuasive evidence of legislative purpose to exclude from the meaning of the general words "terms and conditions" a provision prohibiting home work. No sound explanation for the elimination of the phrase other than the Congressional plan to withhold such power from the Administrator having been advanced, such evidence, in the light of all the circumstances, is conclusive as to the legislative purpose.

## II.

The Administrator, to whom Congress gave no general rule making power notwithstanding the request therefor of the Administrator and Representative Norton subsequent to the passage of the Act, is expressly limited by the terms of Section 8 (f) to including "terms and conditions" only in "Orders issued under this section". As to wage

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<sup>6</sup> Sec. 4(d) of the Act provides: "The Administrator shall submit annually in January a report to the Congress covering his activities for the preceding year and including such information, data, and recommendations for further legislation in connection with the matters covered by this Act as he may find advisable."

rates established automatically by Section 6 of the Act<sup>7</sup> the Administrator clearly does not have the power to prohibit home work for there are no general words anywhere in the statute under the cover of which he might claim such power. To read Section 8 (f) as including the power to prohibit home work would be "nothing short of absurd"; for he then would have the power to prohibit home work in those industries where the minimum wage rate is established by wage order although he clearly cannot prohibit home work in those industries where the minimum wage rate is automatically established by Section 6. Furthermore, in accordance with Section 8 (e) all wage orders of the Administrator will expire on October 23, 1945. To use the language of L. Hand, J., in the concurring opinion below, it is "nothing short of absurd" to ascribe to Congress the purpose of authorizing as a temporary measure "so heroic a remedy" as is imposed by "the proscription of a substantial part of the industry" and which "will disorganize and make over the industry, break up much family economy and produce conditions which cannot possibly adjust themselves until after it has itself ceased to exist" (R. 220).

Furthermore, we may not ascribe to Congress the anomalous purpose of giving the Administrator the power to promulgate, pursuant to Sec. 8 (f), an order prohibiting home work without giving him some power to enforce such order; and yet the enforcement provisions of the Act, Sections 15, 16 and 17, afford the Administrator no method of enforcement of such prohibition by criminal prosecution, injunction or otherwise. The particularity with which the prohibited acts and penalties are described in the enforce-

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<sup>7</sup> This section, establishing fixed wage rates, was the chief contribution of the bill passed by the House of Representatives to the final measure approved by the Conference Committee. The House bill had no provision for administrative orders.

ment provisions of the Act precludes any addition by implication to the catalogue of enforcement measures therein listed. It is obvious, that if Section 8 (f) meant that the Administrator had authority to include a provision prohibiting home work in his wage order, the statute, in express language, would have accounted the Administrator with some implement of enforcement.

## ARGUMENT

### **I. The Fair Labor Standards Act of 1938 Did Not, Expressly or Impliedly, Authorize the Administrator to Include in a Wage Order a Provision Which Prohibits Home Work.**

The Administrator asserts the power to prohibit home work as a "term and condition" of a wage order by virtue of Sec. 8 (f) of the Act (R. 67). The words "terms and conditions" as used in Section 8 (f) are not words of art, so crystal clear as to what they embrace that their broadest possible meaning must be accepted without a consideration of the circumstances of their employment.<sup>8</sup> Mr. Justice Murphy in *Harrison v. Northern Trust Co.*, 317 U. S. 476, 479, said "But words are inexact tools at best and for that reason there is wisely no rule of law forbidding resort to explanatory legislative history no matter how 'clear the words may appear on superficial examination'. *U. S. v. American Trucking Assns.*, 310 U. S. 534, 543-544; See also *U. S. v. Dickerson*, 310 U. S. 554-562". It is therefore apparent that the broad, general language of Sec. 8 (f) is capable of a clear meaning only when read in the light of the circumstances of its employment. (cf. Holmes, J. in *Popovici v. Agler*, 280 U. S. 369; Richard R. Powell, 14

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<sup>8</sup> The Administrator, in his "Findings and Opinion", stated that he made a careful study of the legislative history of Section 8 (f) and he conceded that the ultimate question of his authority was for the Court (R. 67).

Indiana L. J. 199, at p. 231). We therefore direct our attention to the legislative history of the Act in order to determine whether the phrase "terms and conditions" as used in Sec. 8 (f) includes within its meaning a provision which prohibits home work.

*Legislative History of the Fair Labor Standards Act of 1938*

On May 24, 1937 the President sent his message to Congress urging it to enact legislation "to reduce the lag in the purchasing power of industrial workers", to put an end "to the existence of child labor" and to exercise control of wages and hours "without creating economic dislocation." (Report No. 1452, H. R., 75th Cong. First Sess. pp. 6-7).

On the same day Senator Black introduced S. 2475 in the Senate (81 Cong. Rec. 4954) and Representative Connery introduced H. R. 7200 in the House of Representatives (81 Cong. Rec. 4998). Joint public hearings were held by the Senate and House committees to which the respective bills were referred (Joint Hearings, 75th Congress, First Session on S. 2475 and H. R. 7200). On July 6th, S. 2475 was reported by the Committee to the Senate (81 Cong. Rec. 6894).

The Committee's report on this Bill (Senate Report No. 884, 75th Cong. First Sess.) was submitted to the Senate by Senator Black. The report states, at pages 4-5: "Practical statesmanship suggests the wisdom of a cautious legislative approach to the progressive realization of these social and economic objectives. The committee has accordingly restricted the bill to the establishment of minimum wages not in excess of 40 cents per hour and maximum hours not shorter than 40 hours a week and the prohibition of industrial child labor \* \* \*. The committee has diligently endeavored to write in the law itself, the rules and

legal prohibitions intended to accomplish the desired objectives \* \* \*."

On July 27, 1937, Senator Black having been asked on the floor of the Senate if the bill had anything to do with the regulation of prison labor, stated: "the committee reached the conclusion that it would be unwise and improper to attempt to deal in this bill with anything except minimum wages, maximum hours and child labor" (81 Cong. Rec. 7658). He again stated that the Committee decided "that we would limit the bill strictly to minimum wages, maximum hours, and child labor and that is what we have done" (81 Cong. Rec. p. 7659).<sup>9</sup>

The Senate Bill contained no provision for the prohibition of home work, notwithstanding the fact that on June 4, 1937 the Secretary of Labor appeared at the Joint Hearings and stated that power should be given to the administrative authority to "prohibit entirely the use of industrial home work" (Printed Testimony of the Joint Hearings, pp. 184, 190, 196, 197). She also indicated that the powers of the Board ought to be carefully defined by Congress so that the Act itself would clearly state the powers which the Board had (Joint Hearings, p. 195). In a colloquy between Secretary Perkins and Representative Thomas, Secretary Perkins stated that the Act should be written so as to specifically give the administrative authority the power to prohibit home work, but Representative Thomas interposed the objection that that would place a

<sup>9</sup> This purpose of limiting the statute to the establishment of minimum wages, maximum hours and the prohibition of child labor, is not obscured by the fact that the Act was to be known as "The Fair Labor Standards Act". Sec. 2 (11) of S. 2475, as reported by the Joint House and Senate Committee, defines "Fair Labor Standards" as meaning "a condition of employment under which (A) no employee is employed at an oppressive wage; or (B) no employee is employed for an oppressive work week." Subsections (8) and (9) of Section 2 define "oppressive wage" as a wage lower than the applicable minimum wage declared by the order of the Board and "oppressive work week" as a work week longer than the applicable maximum work week declared by order of the Board.

superhuman tax upon the administrative agency (Joint Hearings, p. 190.<sup>10</sup> Mention of industrial home work was also made at pages 402, 408, 409 and 432 of the Printed Minutes of the Joint Hearings.

The bill was debated in the Senate for a period of about a week (81 Cong. Rec. 7596-7957, *passim*). Section 9 (6), relating to wage orders, provided that such an order shall contain such terms and conditions as the Board finds necessary to carry out the purposes of such order, to prevent the circumvention or evasion thereof, or to safeguard the fair labor standards therein established. On the floor of the Senate, on July 30, 1937, one day prior to the passage of the bill, Senator Murray proposed an amendment to Section 9 (6) adding the words "including the restriction or prohibition of industrial home work". He said "it seems to me that such a provision should be made in this bill". The amendment was agreed to without debate or a record vote (81 Cong. Rec. 7891). In fact, during all the debates in the Senate from July 26th to July 31st, 1937 there was no opposition to the bill comparable to that shown in the House. The bill passed the Senate on July 31, 1937 (81 Cong. Rec. 7957).

The bill S. 2475 limited the Labor Board's jurisdiction to fixing wages not in excess of 40 cents per hour and maximum hours not less than 40. Section 11 provided for advisory committees. The provisions of sections 14 (a) and 14 (b) requiring the posting of schedules of the hours of work of each employee and authorizing the Board to

<sup>10</sup> "The Act extends to thousands upon thousands of persons and businesses. It is estimated that the Act covers 15,500,000 persons employed by more than 360,000 employers in 48 states, the District of Columbia, Hawaii, Porto Rico and the Virgin Islands." Mr. Justice Douglas, dissenting in *Cudahy Packing Co. v. Holland* (1942), 315 U. S. 357, at page 368. The Administrator's Annual Report for the fiscal year ending January 30, 1941, at page 106, indicates 71% non-compliance with the Act and the report for the year 1943 at page 34 indicates 65% non-compliance, in industries in general.

require that goods be labeled were ultimately stricken from the Act.

No action was taken by the House Committee on H. R. 7200, which committee "in order to expedite the passage of the bill" considered only S. 2475 (which had been referred to it on August 2, 1937. 81 Cong. Rec. 8063) and reported it favorably with amendments to the Committee of the whole House on the State of the Union. (82 Cong. Rec. 1386; H. Report No. 1452, 75th Cong. First Sess.; 81 Cong. Rec. 8478).

On December 13, 1937, the House resolving itself into a Committee of the Whole House on the State of the Union, began consideration of S. 2475 (82 Cong. Rec. 1385, 1389, 1390, 1463-1834, *passim*). The full force of opposition to giving the Board wide discretionary powers was displayed in the debates on the floor of the House.

On December 15, 1937, Representative Mary Norton, Chairman of the House Committee on Labor, who was a House manager on the final Conference Committee, and who, on the death of Representative William Connery, became the sponsor of the bill in the House, presented a substitute bill following in most details the original S. 2475, but setting up an Administrator instead of a Board. Section 9 (6), relating to wage orders, contained the same provision as to the prohibition of home work as the bill that passed the Senate (82 Cong. Rec. 1511-1516 at p. 1514; 1572-1577 at p. 1575; 1580-1585 at p. 1583).

On December 17, 1937, S. 2475 was ordered printed, showing the bill as amended and agreed to in the Committee of the Whole House on the State of the Union and recommitted to the Committee on Labor. The provision relating to the posting of schedules and the provision as to the requirement of labels contained in Section 14 (a) and 14 (b) of S. 2475 was stricken out in this draft. With respect to the provision relating to the posting of schedules, Congressman

Ramspeck of the House Labor Committee, who was later a House manager of the Final Conference Committee, had said he would move to amend S. 2475 by striking out the provisions relating to the posting of schedules of the time each employee went to work and quit work. He had said "I say it is absolutely absurd to put business under any such regulation as that."<sup>11</sup> Mrs. Norton then said that the Committee did not oppose such amendment (82 Cong. Rec. 1821). House Report No. 1452, 75th Congress, First Session, Union Calendar No. 535 dated August 6th, 1937, at p. 18, refers to the Committee amendment proposing to strike out the provision authorizing the Board to direct that goods subject to the Act be labeled.

The House print of S. 2475, dated December 17, 1937, authorized the Administrator to enjoin any violation not only of any provision of the act, but also of any provision of any labor standard order (Section 13, amended to read Section 12). Section 16 (amended to read Section 15) gave the Administrator general rule-making powers.

On April 21, 1938, the passage of S. 2475 having been blocked in the House by the objections to the discretionary powers which it granted to the administrative agency, an entirely new measure was reported establishing fixed minimum wages and maximum hours, and giving the Secretary of Labor only the power to declare that a particular industry was "an industry affecting commerce" and therefore subject to the Act. It contained no provision for administrative orders. It also contained Child Labor provisions (H. Report No. 2182, 75th Cong., 3rd Sess., Union Calendar No. 805).

On May 23 and May 24, 1938, the debates continued in the House, and were directed mainly to substitute bills patterned after the original S. 2475. On May 24, 1938, Repre-

<sup>11</sup> The Administrator had stated that provisions covering these subjects were stricken without comment (Memorandum for respondent on Petition for Writs of Certiorari, p. 14).

sentative Ramspeck introduced a substitute bill, Section 8 (6) thereof, relating to wage orders, having the same provisions with respect to home work as were contained in the Norton substitute and in the original S. 2475 as it passed the Senate. The Ramspeck substitute was rejected in the House by a record vote, having been previously rejected by the Labor Committee (83 Cong. Rec. 7389, 7373—1st paragraph, Second Column 7378). This bill was substantially the same as the original Senate bill (83 Cong. Rec. 7378). Representative Ramspeck explained that the posting-of-schedule provision had been taken out of substitute. "These things just simply interfere with business and are not necessary to a proper functioning of the law" (83 Cong. Rec. 7378).

On May 24, 1938, the newly reported House bill was passed (83 Cong. Rec. 7449-7450). Conferees were appointed in the Senate and in the House (83 Cong. Rec. 7560, 7770). Senator Murray, Representatives Norton and Ramspeck were amongst the conferees. The conferees met on June 2, 1938 (83 Cong. Rec. 8028) and on June 14, 1938 the Conference Report was read in the House (83 Cong. Rec. 9246-9255). Representative Norton stated "The Conference Committee met every day for 12 days and the bill was written around the conference table" (83 Cong. Rec. 9256). The Conference Report contained an analysis of the provisions of the Senate bill and the House bill and indicated that substantial portions of both bills were transferred to the final conference bill, which incorporated the fixed wage scheme of the House bill together with the flexible wage scheme of the Senate bill. It is apparent from an examination of the report, and from a comparison of the language of the two bills from which the final measure was derived with the language of the final enactment, that S. 2475 which was before the Conference Committee, had been examined word by word, sentence by sentence, and paragraph by paragraph. In drafting Section 8 (f) which was compara-

ble to Section 9 (6) of the Senate bill, the conferees deliberately rejected the parenthetical clause "(including the restriction or prohibition of industrial home work or of such other acts or practices)," which followed the words "terms and conditions." The Conference Report was signed in the House on June 14, 1938 (83 Cong. Rec. 9345) and in the Senate on June 15 (83 Cong. Rec. 9348) and the bill was signed by the President on June 16, 1938 (83 Cong. Rec. 9616). In the final discussions of the conference bill, the limited nature of the Administrator's discretion with respect to fixing wage rates was pointed out in the House and Senate (83 Cong. Rec. 9263; 9164, 9177).

Subsequent to its passage, Representative Norton at the suggestion of the Administrator (See First Annual Report of the Administrator of the Wage and Hour Division, U. S. Dept. of Labor for the Calendar Year 1939, at p. 16) proposed H. R. 5435 to the 76th Congress. Referring to the Administrator's lack of power to make rules and regulations, Representative Norton said on March 29, 1939, "I believe that he further needs \* \* \* the power to make special provisions with respect to industrial home work" (84 Cong. Rec. 3498). H. R. 5435 would have given the Administrator that power. On April 26, 1940, still pressing for an amendment, Mrs. Norton said "This section will also give him the right to \* \* \* make special provisions with respect to industrial home work." 86 Cong. Rec. 5122.

Section 4 (a) of H. R. 5435 (86 Cong. Rec. 5193 if enacted) would have given the administrator the authority to make regulations and "without limiting the generality of the foregoing" to make special provision "with respect to, including the restriction of, homework to the extent necessary to safeguard the minimum wage standards provided by the statute".

Bulletin No. 26 of the U. S. Department of Labor, Division of Labor Standards, entitled, "Industrial Homework Legislation and Its Administration", published in 1939, after

the enactment of the Fair Labor Standards Act, stated at pages 7 and 8 thereof, that legislation by the Federal Congress had been urged that anticipates the abolition of the home work system and pointed out that the Act contains no proscription as to the place where the employee shall work. The bulletin states, at page 10, with respect to industrial homework "the matter of effective administrative techniques is still in a formative period."

In a document entitled "Suggested Language for a State Wage and Hour Bill (Adapted for State Use from 'Fair Labor Standards Act of 1938')" prepared by a Committee appointed by the Secretary of Labor in response to a suggestion to supplement federal legislation by state action, a specific provision is made authorizing the State Industrial Commissioners to make orders which "may include such terms and conditions including the restriction or prohibition of industrial home work", as the Commissioner finds necessary to carry out the purposes of the Act "or of a wage order issued thereunder, and to prevent the circumventions or evasion thereof and to safeguard the standards therein established \* \* \*." (Commerce Clearing House, Labor Law Service, Vol. 2A, page 40101 et seq.)

A. THE LEGISLATIVE HISTORY OF THE FAIR LABOR STANDARDS ACT SHOWS THAT THE PROHIBITION OF HOME WORK AS A METHOD OF ENFORCING THE MINIMUM WAGE RATE WAS EXCLUDED FROM THE LEGISLATIVE DESIGN EMBODIED IN THE ACT.

The language of Section 8(f) of the Fair Labor Standards Act of 1938 follows the language of Section 9(6) of S. 2475 so closely as to produce the conviction that the Conference Committee draftsmen had Section 9(6) before them, and, considering it word by word, deliberately excluded the reference to home work, cf. *Western Vegetable Oils Co. v. Southern Cotton Oil Co.*, (CCA 9-1944) 141 F.

2nd, 235, 237. The significance of the omission of the parenthetical clause relating to home work lies in the fact that "successive drafts of the same act do not simply succeed each other as isolated phenomena, but the substitution of one for another necessarily involves an element of choice often leaving little doubt as to the reasons governing such choice." (James J. Landis, 43 Harv. L. R., 886, 889). The omission by the conference bill bespeaks the legislative purposes and design as eloquently as would a direct statement in the report.

In the following parallel columns the provisions of Section 8(f) of the Fair Labor Standards Act of 1938 are set forth with the comparable provision of the Senate Bill, S. 2475, which was rejected by the Conference Committee.

### Enacted

Section 8 (f) of the Fair Labor Standards Act of 1938 provides as follows:

"Orders issued under this section shall define the industries and classifications therein to which they are to apply, and shall contain such terms and conditions

as the Administrator finds necessary to carry out the purposes of such orders, to prevent the circumvention or evasion thereof, and to safeguard the minimum wage rates established therein."

### Rejected

Section 9(6) of S. 2475 provided as follows:

"A labor-standard order  
\* \* \*

(6) shall contain such terms and conditions **(including the restriction or prohibition of industrial homework or of such other acts or practices)**

as the Board finds necessary to carry out the purposes of such order, to prevent the circumvention or evasion thereof, or to safeguard the fair labor standards therein established."

In the light of the foregoing legislative history, the action of the Conference Committee in deliberately excluding from Section 8(f) the provision relating to the prohibition of home work is conclusive that, within the meaning of Section 8(f), the words "terms and conditions" do not include a grant to the Administrator of the authority to prohibit home work which would have been given to him by the omitted clause. *Lapina v. Williams*, 232 U. S. 78, 89-90; *Cudahy Packing Co. v. Holland*, 315 U. S. 357, 362 (f. n. 3), 366; *Pa. R. R. Co. v. Internat'l Coal Mining Co.*, 230 U. S. 184, 198; *Maurer v. Hamilton*, 309 U. S. 598, 613; *McLeod v. Threlkeld*, 319 U. S. 491, 394; *Boston Sand and Gravel Company v. U. S.* 278 U. S. 41, 47-48; *J. W. Ould Co. v. Davis*, (CCA 4) 246 F. 228; *Keystone Mining Co. v. Gray*, (CCA 3) 120 F. 2nd 1, 9-10; *U. S. v. Delaware and Hudson Co.*, 213 U. S. 366, 414; *U. S. v. United Shoe Machinery Co.*, 264 F. 138, 174-175, aff'd. 258 U. S. 451; *Carey v. Donohue*, 240 U. S. 430, 436-437; *Fleming v. Hawkeye Pearl Button Co.*, (CCA 8) 118 F. 2nd 52, 58; *Boyd v. Thayer*, 143 U. S. 135, 167-168; *MacDonald v. Southern Express*, 134 F. 282, 288.

The Administrator has argued that the cases above cited are not in point since "the House never specifically rejected the parenthetical clause referring to home work." Many of the cases cited, however, included rejection and exclusion of amendments by Conference Committees (See *Lapina v. Williams*, *Cudahy Packing Co. v. Holland*, *Penn. R. R. v. International Coal Mining Co.*, and *Keystone Mining v. Gray*, supra), as well as the rejection of amendments by a vote on the floor.

The omission of the parenthetical clause may not be attributed merely to style or draftsmanship. Parenthetical clauses introduced by the word "including" are found in other portions of the Act, e. g. Sec. 3(f) and Sec. 3(i). Furthermore, the Labor Department had expressly requested

the inclusion of a specific provision to authorize the prohibition of home work, and the Department of Labor's carefully drafted model state uniform wage and hour bill specifically included a provision permitting the administrative authority to prohibit home work as a term and condition of a wage order (*supra*, p. 18).

Judge Hand, in his concurring opinion below, indicated that the omission of the clause relating to home work might be attributed to a desire to prevent the specification within the parenthesis from being taken as exhaustive (R. 221). The parenthetical phrase "including the restriction and prohibition of industrial home work" contained in the rejected amendment to S. 2475, if it had been left in the Act, would not have limited the generality of the powers previously conferred, under the decisions of this Court in *Phelps Dodge Corp. v. N. L. R. B.*, 313 U. S. 1774, 189, and in *Federal Land Bank of St. Paul v. Bismarck*, 314 U. S. 95, 100. In the latter case, Mr. Justice Murphy said: "The term 'including' is not one of all embracing definition, but connotes simply an illustrative application of the general principle." Consequently, the suggestion made by Judge Hand in the Court below that the phrase was omitted "lest the specification be taken as exhaustive" must necessarily fall.—The expedient of using the commonly employed phrase "without limiting the generality of the foregoing" was also available to an overcautious draftsman.

The Fair Labor Standards Act of 1938 was a compromise between the Senate and House bills, but the significance of that fact is the resulting restriction on the wide discretionary powers given to the administrative agency by the Senate bill. The Act itself, the Committee reports, the statement of its proponents and sponsors and the whole record of Congressional action on the bill indicate that the legislation was an experiment limited in scope and was intended to deal only with precise subjects, namely wages,

hours and child labor. Since S. 2475 had specifically defined "substandard labor condition" as employment in violation of wage and hour standards (Sec. 2(a) (10), (11), (8), (9)), the Congressional findings and declaration of policy embodied in Section 2(a) of the present enactment exhibit no intent to deal with any matter other than substandard conditions in industry resulting from wage and hour practices, or from the employment of child labor, which is expressly mentioned in the Act.

In such a setting the words "terms and conditions" of Sec. 8(f) do not include provisions to prohibit the practice of home work. The Administrator's argument that the prohibition of home work is merely incidental to a wage order and is therefore permissible, since it is not a regulation of home work as an independent subject, disregards not only the limited nature and scope of the experiment which Congress authorized, but also the fact that the very purpose of excluding the parenthetical clause which modified the words "terms and conditions" was to withhold from the Administrator the power to prohibit home work by making a "term and condition" incidental to a wage order.

B. A CONSIDERATION OF VARIOUS PROVISIONS OF THE FAIR LABOR STANDARDS ACT EXCLUDES THE PROHIBITION OF HOME WORK FROM THE MEANING OF THE WORDS "TERMS AND CONDITIONS" AS USED IN SECTION 8(f).

1. The statutory minimum wage rates ("statutory wages") fixed by Section 6 of the Act become operative without the issuance of a wage order. The Administrator cannot prohibit home work as to "statutory wages" since there is no wage order to which he might attach "terms and conditions". Section 8(f) expressly limits the Administrator's power to make "terms and conditions" to "Orders issued under this section." To interpret the words "terms and conditions" in Section 8(f) as includ-

ing the power to prohibit home work would therefore lead to the unfair and untenable conclusion that the Administrator has power to prohibit home work in those industries where the minimum wage rate is established by wage order, although he clearly may not prohibit home work in those industries where the minimum wage rate is automatically established by Section 6.

Furthermore, in accordance with Section 8(e), the Administrator's wage order prohibiting home work will expire on October 23, 1945. It would, therefore, be absurd to assume that Congress intended that the Administrator could make so disruptive but temporary a regulation as the prohibition of home work would entail (R. 219-220). The Administrator's argument that once home work is abolished it will not be resumed is contrary to his own findings (R. 110-111).

Judge L. Hand frankly admitted that unless Congress gave the Administrator power to prohibit home work with respect to "statutory wages", it would be absurd to conclude that Congress gave him such power as to "committee wages" (R. 219-220). He stated that he would disregard the explicit language of Section 8(f) which confines the Administrator's power to make terms and conditions to "Orders issued under this Section", and would hold it applicable to Section 6.

Although general language of a statute need not be given its broadest possible meaning, the disregard of specific language is not justified. As Judge Frank said, in *Queensboro Farm Products v. Wickard*, 137 F. 2nd 969, 980. "The Secretary cannot, of course, deviate from the requirements of the statute merely to avoid difficulties of administration or to facilitate enforcement of the Act (cf. *Lynch v. Tilden Produce Co.*, 265 U. S. 315, 44 S. Ct. 488, 68 L. Ed. 1034)." And Judge L. Hand, dissenting from the holding in the *Queensboro* case, said at p. 983, that under the guise of

affecting the policy of a statute "we ought not to disregard those means to which the realization of that policy was confided."

In further support of his contention that the rejection of the amendment relating to home work did not have the effect asserted by the petitioners, Judge L. Hand stated in his concurring opinion (R. 221) that if home work were excised from the Administrator's powers because of the deletion, he could not even regulate labels. The distinguished judge evidently had in mind the Administrator's argument below, repeated in his memorandum on the petition for certiorari (pp. 11-12), that in a draft of a confidential Sub-Committee Print "A" of February 18, 1938, the provision comparable to 8 (f) read:

"(3) shall contain such terms and conditions (including the restriction or prohibition of industrial home work or such other acts or practices and such requirements as the keeping of records, labeling, periodic reporting and posting of orders and schedules) as are deemed necessary to carry out the purpose of such order and prevent the circumvention or evasion thereof, or to safeguard the standards therein established."

The obvious answer to that argument is that although all of these provisions were not included in the Fair Labor Standards Act, the record keeping provisions and reporting provisions were included in Section 11 of the Act, but the posting provisions and the provision as to the requirement of labels were specifically deleted from the Act for the very purpose of withdrawing from the Administrator any authority to regulate these practices, as the statement of the legislative history of the Act clearly demonstrates (see *supra* page 15-16). The Administrator has never attempted to require the labeling of products nor has he promulgated regulations requiring the posting of sched-

ules, and he does not have authority under the Act to make such regulations.

2. Judge Swan, dissenting, said that "terms and conditions" as used in Section 8(f) meant "terms and conditions which are truly incidental to administration, that is, requirements as to keeping records, filing reports, etc." (R. 224). It is not uncommon for statutes to contain tautological provisions; or it may be that Section 8(f) related to the prevention of practices devised by employers to avoid payment of the minimum wage, such as the "split day plan contracts" involved in the *Helmerich & Payne* case decided by this court November 6, 1944. Such evasive practices, unlike the long established practice of home work, could not have been foreseen by the legislators and consequently could not have been specifically dealt with in the Act. Since they involve non-payment of the minimum wage rate, the enforcement provisions of the Act are adequate to permit the Administrator to deal with them.

If the Administrator prescribes as a "term and condition" of a wage order the keeping of special records, or the filing of special reports for home workers, he can enforce these provisions under the Act, for Section 11 (c) makes it mandatory for employers to comply with Administrator's regulations or orders relating to records and reports. Section 15 makes it unlawful to violate the provisions of Section 11 (c) and consequently the criminal penalties of Section 16 and the provisions of Section 17 relating to injunction proceedings are applicable.

The words "terms and conditions" as used in Section 8(f), however, may not be read to include the prohibition of home work, for the Act contains no provision relating to the enforcement of such prohibition. Sections 15, 16 and 17, the enforcement provisions of the Act, relate specifically and in detail to the violations of the minimum wage and

maximum hour provisions, whether they are fixed by statute or by wage order (Sec. 6); they also relate to regulations and orders made by the Administrator relating to learners, apprentices and handicapped workers, record keeping and reports, and to the child labor provisions (Sec. 11c, 12, 14). If the Act had purported to empower the Administrator to incorporate in a wage order under Section 8(f), a provision for the prohibition of home work, Congress would not have spared the few words necessary to include such provision within the scope of the enforcement sections. Assuming the payment of minimum wages to home workers, the goods produced by them may be shipped in commerce with impunity; and, assuming compliance also with record keeping provisions, as the Act now reads, neither employee nor employer would be subject to criminal penalty nor could they be restrained by injunction.

The means of enforcement prescribed by the statute, since they are detailed and specific, cannot be enlarged by implication (cf. *Addison v. Holly Hill Products, Inc.*, — U. S. —, June 5, 1944) nor are there any general words in the statute which could be read as a prescription of the method of enforcement of "terms and conditions" relating to home work. The failure of the Act to provide in express language for the enforcement of "terms and conditions" of orders issued under 8(f), as the Act provided for the enforcement of provisions of orders issued under Secs. 11 (c), 12 and 14, clearly indicates that the statute did not include the prohibition of home work as a "term and condition" of a wage order.

3. Other indications that the meaning of "terms and conditions" does not include the prohibition of home work are to be found within the four corners of the Act itself and may be briefly mentioned. The Act deals with child labor in

express terms, indicating that other practices affecting the minimum wage rate were not by implication to be prohibited by the Act.

The phrase "without substantially curtailing employment" recurs in Section 8 (a), (b), (c), (e) and by specific reference, in Section 8 (d), as a limitation on the powers therein conferred. Section 8 (f), however, does not contain this phrase. Certainly, if the words "terms and conditions" were intended to authorize so drastic an act as the prohibition of home work, it would be reasonable to expect that the safeguard "without substantially curtailing employment" would have been repeated.

4. The limited scope of the Administrator's authority under the Act is also indicated by the fact that the statute confines his authority to make rules and regulations to certain specified sections; by the fact that he may only accept or reject the industry committee's recommendations as to the minimum wage rate and may not substitute his own conclusions or vary the committee's recommendation; and by the fact that the administration of the child labor provisions was not delegated to the Administrator.

5. Section 8 (f) has no provision for a hearing with respect to "terms and conditions" of a wage order. (See R. 65). The Labor Department's Uniform State Wage and Hour Law, and S. 2475, which specifically empowered the administrative agency to prohibit home work as a "term and condition" of a wage order, also specifically provided for hearings on the question. Were the words "terms and conditions" intended to include a provision relating to the prohibition of home work it would be reasonable to expect that Congress would have made express provision for hearings on the question of the prohibition of home work.

### Conclusion

It is respectfully submitted that the orders and decrees of the United States Circuit Court of Appeals of the Second Circuit should be reversed, and that the Wage Order of the Respondent be modified by setting aside those provisions thereof which prohibit and restrict home work.

Respectfully submitted,

SAMUEL S. ALLAN,  
*Counsel for Petitioners,*  
*Gemsco, Inc., et al.*

SEYMOUR D. ALTMARK,  
*Of Counsel.*

WALTER BROWER,  
*Counsel for Petitioners,*  
*Maretzo, et al.*

COLEMAN GARGEL,  
ILO ORLEANS,  
*Of Counsel.*

SAMUEL J. COHEN,  
*Counsel for Petitioners,*  
*Guisseppi, et al.*

SOLOMON S. FRIEDMAN,  
MYRON P. GORDON,  
*Of Counsel.*

In the Supreme Court of the United States

OCTOBER TERM, 1944

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GEMSCO, INC., ET AL., PETITIONERS

v.

L. METCALFE WALLING, ADMINISTRATOR OF THE  
WAGE AND HOUR DIVISION, UNITED STATES  
DEPARTMENT OF LABOR

---

MILDRED MARETZO, ET AL., PETITIONERS

v.

L. METCALFE WALLING, ADMINISTRATOR OF THE  
WAGE AND HOUR DIVISION, UNITED STATES  
DEPARTMENT OF LABOR

---

JOSEPHINE GUISEPPI, ET AL., PETITIONERS

v.

L. METCALFE WALLING, ADMINISTRATOR OF THE  
WAGE AND HOUR DIVISION, UNITED STATES  
DEPARTMENT OF LABOR

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ON PETITION FOR WRITS OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS FOR THE  
SECOND CIRCUIT

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MEMORANDUM FOR RESPONDENT

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# In the Supreme Court of the United States

OCTOBER TERM, 1944

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No. 368

GEMSCO, INC., ET AL., PETITIONERS

v.

L. METCALFE WALLING, ADMINISTRATOR OF THE  
WAGE AND HOUR DIVISION, UNITED STATES  
DEPARTMENT OF LABOR

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No. 369

MILDRED MARETZO, ET AL., PETITIONERS

v.

L. METCALFE WALLING, ADMINISTRATOR OF THE  
WAGE AND HOUR DIVISION, UNITED STATES  
DEPARTMENT OF LABOR

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No. 370

JOSEPHINE GUISEPPI, ET AL., PETITIONERS

v.

L. METCALFE WALLING, ADMINISTRATOR OF THE  
WAGE AND HOUR DIVISION, UNITED STATES  
DEPARTMENT OF LABOR

---

ON PETITION FOR WRITS OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS FOR THE  
SECOND CIRCUIT

---

MEMORANDUM FOR RESPONDENT

**OPINIONS BELOW**

The principal opinion below (R. 211-241) was written by Judge Frank. Judge Learned Hand delivered a concurring opinion (R. 241-243). Judge Swan delivered a dissenting opinion (R. 243-246). These opinions have not yet been reported.

**JURISDICTION**

The judgments of the circuit court of appeals were entered July 27, 1944 (R. 246-248). The petition for certiorari was filed August 18, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, and Section 10 (a) of the Fair Labor Standards Act.

**QUESTIONS PRESENTED**

1. Whether the Fair Labor Standards Act authorizes the Administrator to include in a minimum wage order a term or condition prohibiting employers from distributing industrial homework to homework employees, upon finding pursuant to Section 8 (f) of the Act that the prohibition is necessary to carry out the purpose of such order, to prevent the circumvention or evasion thereof, and to safeguard the minimum wage rates established therein.
2. Whether Section 8 (f) involves an unconstitutional delegation of legislative power.
3. Whether the prohibition of industrial homework violates the Fifth Amendment.

## STATUTE INVOLVED

Section 6 of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C. 201 *et. seq.*, establishes basic minimum wages to be paid each employee engaged in interstate commerce or in the production of goods for interstate commerce—prior to October 24, 1939, the minimum was 25 cents an hour; from then until October 24, 1945, it is 30 cents an hour; and thereafter (subject to a few exceptions) it will be 40 cents an hour.

Section 8 of the Act, however, looks to the more rapid establishment of the 40-cent minimum by the issuance of administrative wage orders, based on the recommendations of industry committees, fixing “the highest minimum wage rates for the industry which \* \* \* will not substantially curtail employment in the industry” (Section 8 (b)). Section 8 (f) requires the Administrator to include in such wage orders the terms necessary to make them effective:

- Orders issued under this section shall define the industries and classifications therein to which they are to apply, and shall contain such terms and conditions as the Administrator finds necessary to carry out the purposes of such orders, to prevent the circumvention or evasion thereof, and to safeguard the minimum wage rates established therein.

## STATEMENT

The Wage Order for the Embroideries Industry was issued in accordance with the statutory procedures outlined in Section 8. The industry committee unanimously recommended the establishment of a minimum wage rate of 40 cents an hour for all employees in the Embroideries Industry (R. 41). After proper notice, the Administrator held a hearing upon the recommendation (R. 41-42) and approved it (R. 36).

At the time he was considering the industry committee's recommendation, the Administrator was required by Section 8 (f) of the Act to determine also what incidental terms and conditions he should include in any wage order that he might issue establishing a 40 cent minimum wage for the industry. Especially, it was necessary to consider the problem of industrial homework,<sup>1</sup> which the Administrator had previously found it necessary to prohibit in six other industries in order to

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<sup>1</sup> Industrial homework means manufacture in the home. In the Embroideries Industry, which is here involved, as in other industries, the materials worked upon are furnished by the employer, the work is done at home, and the completed product is returned to the employer. The homemaker is to be distinguished from the small entrepreneur who sells his own handiwork. The homemaker simply sells his labor. He is an industrial wage earner like the factory employee. In the Embroideries Industry, precisely the same operations performed by some workers at home are also performed by others in the factories or work shops of their employers (R. 167).

make his wage orders effective.<sup>2</sup> Consequently, although no hearing was required upon this issue, the Administrator broadened the scope of the hearing on the industry committee's recommendation so that it would cover the question whether the distribution of industrial homework should be restricted or prohibited in order to prevent evasion and safeguard the 40 cent minimum wage rate (R. 42).

The Administrator made an exhaustive study of the evidence introduced in order to ascertain the effect of homework upon the establishment of a 40 cent minimum wage rate in the Embroideries Industry. His subsidiary findings of fact (R. 64-169) were summarized by the court below and, in order to avoid repetition, we respectfully refer this Court to that statement (R. 213-218).

The Administrator made two ultimate findings of decisive importance in the present case. He concluded that a prohibition of homework in the Embroideries Industry was necessary to safeguard the 40 cent minimum wage (R. 136-137)—

that it is necessary, in order to carry out the purposes of the minimum wage order for the Embroideries Industry, to prevent

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<sup>2</sup> Jewelry Manufacturing Industry, 8 Fed. Reg. 6097; Knitted Outerwear Industry, 7 Fed. Reg. 2592; Women's Apparel Industry, 7 Fed. Reg. 5589; Gloves and Mittens Industry, 7 Fed. Reg. 6713; Button and Buckle Manufacturing Industry, 7 Fed. Reg. 7586; Handkerchief Manufacturing Industry, 8 Fed. Reg. 1187; Embroideries Industry, 8 Fed. Reg. 12126.

the circumvention or evasion thereof, and to safeguard the [40-cent] minimum wage rate prescribed therein, to include terms and conditions in the order which shall provide that no work in the Embroideries Industry shall be done in or about a home, apartment, tenement, or room in a residential establishment \* \* \* [except in certain specified extraordinary cases].

He also concluded that the practice had no more than incidental importance and that the prohibition would not cause substantial difficulties in the industry (R. 149, 166, 167)—

I have considered all the evidence relating to adjustment to the factory system of manufacture and find that this adjustment can reasonably be made without undue hardship upon home workers or home work employers.

\* \* \* \* \*

I have already found that prohibition of home work will not involve any substantial difficulties in the Industry.

\* \* \* \* \*

Prohibition of home work will not prohibit any type of work or occupation but will merely compel the transfer of work and occupations formerly carried on in the homes to the factory where the workers may be adequately supervised and their payment in accordance with the minimum wage order for the Industry guaranteed. The possibilities of adjustment to a prohibition of home work which are disclosed by the

record furnish ample assurance that no substantial curtailment of operation will result. All of the operations in question are performed in the factory as well as in the home.

Thereupon the Administrator approved the 40-cent minimum wage recommended by the industry committee and issued the wage order under review.

After promulgation of the wage order, petitioners filed petitions for review of the order in the circuit court of appeals, pursuant to Section 10 of the Act, challenging the power of the Administrator to include in the order the terms prohibiting home work. Petitioners conceded that such provisions were necessary to prevent evasion of the wage order and to safeguard the wage rates established but denied that there was power to deal with the evil. The circuit court of appeals sustained the wage order and dismissed the petitions for review (R. 246-248).

#### DISCUSSION

1. Because of the importance of the questions involved we do not oppose the granting of certiorari. We state below, however, our reasons for believing that the decision of the circuit court of appeals is right, and we suggest, for reasons also stated hereinafter, that if certiorari is granted the case be advanced for argument.

2. The purpose of the Wage Order for the Embroideries Industry is to raise, in accordance with

Section 8 of the Act, the minimum wage paid by the industry "to the highest minimum wage rates [not in excess of 40 cents an hour] \* \* \* which \* \* \*, having due regard to economic and competitive conditions, will not substantially curtail employment in the industry" (Section 8 (b)). The prohibition of homework is directed exclusively to safeguarding the minimum wage. The Administrator emphasized in his findings that he had confined himself to the question of the effect of homework on the minimum wage rate and had not taken into account its other social and economic evils (R. 81). As Judge Frank pointed out, "This is not a case, then, where an effort is being made to utilize § 8 (f) as a subterfuge to achieve an independent end outside the scope of the Act" (R. 219-220).

The Administrator's ultimate finding that the prohibition of homework is necessary to prevent evasion of the wage order is amply supported by the evidence adduced at the hearing, although it seems plain under the decision in *Pacific States Co. v. White*, 296 U. S. 176, that neither hearing nor evidence was required. Cf. *Steuart & Bro., Inc. v. Bowles*, No. 793, last Term, decided May 22, 1944. Petitioners, indeed, do not contest the correctness of the finding; moreover, by not bringing the evidence to the court below, they waived any contention that the finding lacks an adequate basis. *Railroad Comm. v. Pacific Gas & Electric Co.*, 302 U. S. 388, 392, 398, 401.

All that Section 8 (f) requires as a prerequisite to the inclusion of a term or condition in a wage order is that the Administrator shall make a valid finding that it is "necessary to carry out the purposes of such orders, to prevent the circumvention or evasion thereof, and to safeguard the minimum wage rates established therein." Here the Administrator made such a finding and its validity is clear. It follows, we submit, that the term prohibiting homework was properly included in the wage order under review.

In making this contention we assume of course that Section 8 (f) implicitly limits to those that are truly incidental the terms and conditions to be included in a wage order. Congress could not catalog all the devices or practices that would circumvent the purposes of a wage order. Neither could Congress answer the detailed questions of degree involved in determining in each situation what enforcement measures would be appropriate incidents to the wage rate established. Congress met these difficulties by leaving the adaptation of means to end to the process of administration. For these reasons Section 8 (f) places no limitation on the kind of terms or conditions to be inserted, or on the subjects that they may touch, but delegates to the Administrator the task of determining what terms and conditions should be included to prevent the order's frustration. The relation of means to end was confided

to the Administrator's sense of proportion. When the Administrator makes a reasonable choice under the circumstances, his decision is final. *Phelps Dodge Corp. v. National Labor Relations Board*, 313 U. S. 177, 194; *Federal Security Administrator v. Quaker Oats Co.*, 318 U. S. 218; *Morgan Stanley & Co. v. Securities Exchange Comm.*, 126 F. (2d) 325, 332 (C. C. A. 2); cf. *Gray v. Powell*, 314 U. S. 402.

The legislative history of the Act demonstrates that Congress knew that the phrase "such terms and conditions as the Administrator finds necessary to carry out the purposes of such orders \* \* \*" was broad enough to include a term or condition prohibiting industrial homework. The Black-Connery Bill, when it passed the Senate, provided that the Administrative wage orders—

shall contain such terms and conditions (including the restriction or prohibition of industrial home work or of such other acts or practices) as the Board finds necessary \* \* \*.

The illustrative parenthetical phrase without the reference to homework—i. e., "(including the restriction or prohibition of such acts or practices)"—had been inserted in committee (S. Rept. 884, 75th Cong., 1st sess.). The express reference to industrial homework was inserted on the floor (81 Cong. Rec. 7891). Obviously, the Senate regarded provisions restricting or prohibiting indus-

trial homework as among the terms and conditions which the Administrator might find it necessary to include in a wage order in order to safeguard the minimum wage.

The House Committee on Labor approved the provision in the form in which it passed the Senate. It was included in the first bill reported and considered on the floor of the House.<sup>3</sup> Even after the bill was recommitted to the Committee on Labor the same language was retained through many revisions.<sup>4</sup> Finally, in the Confidential Subcommittee Print "A" of February 18, 1938, a change was made which added still further examples of "such terms and conditions;" as modified the provision read:

(3) shall contain such terms and conditions (including the restriction or prohibition of industrial home work or such other acts or practices and such requirements as the keeping of records, labeling, periodic reporting and posting of orders and schedules) as are deemed necessary to carry out the purpose of such order and prevent the circumvention or evasion thereof, or to safeguard the standards therein established.

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<sup>3</sup> Section 9 (6), House Committee Print of August 5, 1937; Section 9 (6), as reported August 6, 1937, in H. Rept. 1452, 75th Cong., 1st sess.

<sup>4</sup> Section 9 (6), House Confidential Committee Prints of December 7, 1937, December 14, 1937, and December 17, 1937.

Contrary to the representation implicit in petitioners' brief (pp. 7, 14), the House never specifically rejected the parenthetical clause referring to home work. What happened was this: Shortly before passage, the entire scheme of the House bill was changed. The Senate bill and the first bills reported by the House Committee on Labor had proposed to create a Board having the power to issue administrative orders establishing minimum wage standards. The House Committee on Labor abandoned that plan after several defeats in the House, and reported a bill which would fix specific statutory minimums and contained no provision for administrative orders. S. 2475 as reported by Committee on Labor, H. Rept. 2182, 75th Cong., 3d sess. This bill, of course, also omitted the provision made in the Senate bill for including in administrative orders any necessary incidental provisions. After debate the House approved this bill. 83 Cong. Rec. 7450.<sup>5</sup>

<sup>5</sup> While this draft of bill was being debated in the House, Congressman Ramspeck offered a substitute which adopted the theory of the Senate bill and the earlier House Committee proposals and which therefore included the same provision for incidental terms and conditions which had been in the Senate bill (83 Cong. Rec. 7373-7378). This is the amendment referred to on pages 7 and 14 of the petitioners' brief. The entire substitute was rejected by the Committee and by the House. The clause dealing with home work was a small and comparatively unimportant provision in the substitute bill. It was never separately considered. Obviously, the defeat of the substitute is not the slightest evidence that the House determined to withhold from the Administrator the power to prohibit home work even if the prohibition be necessary

In conference, a compromise was worked out between the Senate plan for administrative regulation of wages and the House proposal for fixed statutory minimums. The Conference bill proposed the fixed statutory standards which are set forth in Section 6 of the Act, but supplemented them with the administrative procedure, now found in Section 8, for raising the minimum rate up to 40 cents an hour by the issuance of administrative wage orders. The Conference bill included *in haec verba* the provisions which are now Section 8 (f).

Neither the Conference Report (H. Rept. 2738, 75th Cong., 3d sess.) nor the ensuing debate reveals the reason for omitting from Section 8 (f) the parenthetical illustrations that the Senate had approved unanimously and the House Committee on Labor had accepted repeatedly as appropriate if any provisions for wage orders was made in the bill. Petitioners' argument that the deletion shows a desire to limit the power of the Administrator proves too much. At various times the parenthesis spoke of "industrial homework," "other acts or practices," "the keeping of records, labeling, periodic reporting," and the "posting of orders and schedules." Surely, it will be conceded that the Conference Committee did not signify by deleting all these illustrations that the

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to the establishment of a fair minimum wage. For this reason the cases cited by petitioners as inconsistent with the decision below entirely miss the mark.

Administrator was to have no power to include any terms or conditions dealing with any evasive "acts or practices," or with record keeping, or reports, or labeling, or posting copies of orders and wage schedules. Yet all the illustrations were deleted without comment and there is no basis for assuming that the Conference Committee intended the deletion of some to work a substantive change and the deletion of others to have no significance. The true explanation of the omission must be that the draughtsman sought to clarify Section 8 (f) by omitting illustrations which had become so cumbersome that there was danger that they might cloud the essentially simple purpose of the section. Cf. *Phelps Dodge Corp. v. National Labor Relations Board*, 313 U. S. 177, 188-189, 211. The significant point in this legislative history, therefore, is not the deletion but is the clear demonstration in the earlier bills that Congress knew that industrial homework was one kind of evasive act or practice that the language of Section 8 (f) was broad enough to cover.

Petitioners lay great stress on the absence of any provision in the Act which would enable the Administrator to prohibit homework in order to prevent evasion of the statutory minimum wage rates as distinguished from the rates established by wage order (Br. 17-18). They emphasize the contrast by pointing out that the power of the Administrator to issue wage orders will terminate for all practical purposes only thirteen months

hence, on October 23, 1945, when, they contend, they will be free to resume the practice of distributing industrial homework. One complete answer is given in the opinion of Judge Learned Hand (R. 241-243): Section 8 (f) should be read as granting power to issue orders containing terms or conditions necessary to prevent evasion of the statutory wage rates. Contrary to petitioners' statement (Br. p. 18), Judge Frank did not disagree with this interpretation.<sup>6</sup>

A second answer is given in Judge Frank's opinion (R. 222-224). Lack of power to prohibit home work to protect the statutory wage rates would not prove that there is no power so to protect the rates fixed by wage order. Under Section 8 (f) all evasive acts and practices stand on the same footing, and the absence from Section 6 of an analogue, expressly authorizing the Administrator to regulate practices evasive of the statutory rates, surely does not show that Congress intended Section 8 (f) to be wholly nugatory. The Act was a compromise between conflicting proposals. It would not be surprising, therefore, to find that a power given to the Administrator in connection with his authority to issue administrative wage orders was not conferred in those parts of the bill which were drawn from a proposal to fix rigid statutory rates without administrative ac-

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<sup>6</sup> See R. 222-223, where Judge Frank stated that in his view the question of the power of the Administrator to safeguard the statutory wage rates "is an issue not now before us."

tion. "Legislation introducing a new system is at best empirical, and not infrequently administration reveals gaps or inadequacies of one sort or another that may call for amendatory legislation. But it is no warrant for extending a statute that experience may disclose that it should have been made more comprehensive." See *Addison v. Holly Hill Fruit Products, Inc.*, No. 217, last Term, decided June 5, 1944, slip sheet, p. 8. Neither is the existence of a possible defect or the absence of perfect symmetry sufficient reason for narrowing a statute by restricting a power that the words have plainly granted.

Judge Learned Hand expressed the opinion that this reading of the statute ascribed to Congress absurdity of purpose because the consequences of the prohibition of homework would be felt long after the industry would be free to resume it. But his opinion on this point, we believe, exaggerates the injury to the industry, in disregard of the Administrator's findings, and minimizes the good to be achieved by the prohibition of homework for even a year. The Administrator found that the prohibition of homework in the Embroideries Industry "will not prohibit any type of work or occupation but will merely compel the transfer of work and occupations formerly carried on in the homes to the factory" (R. 167), "will not involve any substantial difficulties in the Industry" (R. 166), and "can reasonably be made without undue hardship upon home workers or home work-

employers" (R. 149). Moreover, experience gives reason to believe that the practice of distributing industrial homework, once abolished, will not be resumed, because of the advantages to the employer of supervised production (R. 149-153, 164-165). Hence, enforcement of the prohibition now is not only necessary to prevent evasion of the 40-cent minimum wage established by the wage order but it may in fact go far to forestall evasion of the statutory minimums in the future.

Section 8 (f), moreover, should not be read as if it had been enacted to cover only the thirteen month period for which this wage order will be effective. In 1938 when the Act became effective, wage orders had seven years to run. Orders covering other industries which contain prohibitions of homework have been in force for several years. Surely it was not unreasonable for Congress to confer authority upon the Administrator to prevent evasion of wage orders for a seven year period, even though it may not have dealt with the danger of evasion of the fixed statutory rates in the more distant future.

Petitioners also attack Section 8 (f) and the prohibition of homework on constitutional grounds. These arguments, however, are answered fully in the opinion of Judge Frank (R. 224-241) and require no additional discussion.

3. In the event that writs of certiorari are granted, we respectfully suggest that the cases be advanced for argument.

221-224). These opinions are reported in 144 F. (2d) 608.

### **JURISDICTION**

The judgments of the circuit court of appeals were entered on July 27, 1944 (R. 224-226). The petition for a writ of certiorari was filed on August 18, 1944 and granted on October 16, 1944 (R. 231-232). The jurisdiction of this Court is based upon Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, and Section 10 (a) of the Fair Labor Standards Act.

### **QUESTION PRESENTED**

Whether the Fair Labor Standards Act authorizes the Administrator to include a term or condition prohibiting industrial homework in a minimum wage order upon finding, pursuant to Section 8 (f) of the Act, that the prohibition is necessary to carry out the purposes of such order, to prevent the circumvention or evasion thereof, and to safeguard the minimum wage rate established therein.

### **STATUTE INVOLVED**

Section 6 of the Fair Labor Standards Act <sup>2</sup> establishes basic minimum wages to be paid each

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<sup>2</sup> Fair Labor Standards Act of 1938, 52 Stat. 1060, 29 U. S. C. 201 *et seq.* For the convenience of the Court a complete copy of the Act is set forth as an Appendix, *infra*, p. 80.

employee engaged in interstate commerce or in the production of goods for interstate commerce. Prior to October 24, 1939, the minimum was 25 cents an hour; from then until October 24, 1945, it was, is, and will be 30 cents an hour; thereafter it will be 40 cents an hour.

Section 8 of the Act looks to the more rapid establishment of the 40-cent minimum by the issuance of wage orders applicable to particular industries fixing "the highest minimum wage rates for the industry which \* \* \* will not substantially curtail employment in the industry" (Section 8 (b)). Section 6 provides that any rate so fixed shall become the minimum wage to be paid to every employee covered by the Act and the order.

Section 8 also prescribes both the procedure to be followed in promulgating a wage order and the terms which the order may contain. The Administrator is to summon an industry committee consisting of equal numbers of public, employer and employee representatives (Sections 5 (a), 5 (b), 5 (c), 8 (a)). The Committee is to make an investigation and recommend "the highest minimum wage rates for the industry which it determines, having due regard to economic and competitive conditions, will not substantially curtail employment in the industry" (Sections 8 (b), 8 (c)). Upon receiving the report of the industry commit-

tee, the Administrator is to give interested persons notice and an opportunity to be heard, and thereafter he is to determine whether the recommendations are in accordance with law, supported by the evidence, and adapted to carrying out the purposes of the Act. If the Administrator disapproves the report, he refers the matter back to the industry committee. If he approves the report, he "shall by order approve and carry into effect the recommendations". (Section 8 (d).)

Section 8 (f) requires the Administrator to include in such wage orders the terms necessary to make them effective. It provides:

Orders issued under this section shall define the industries and classifications therein to which they are to apply, and shall contain such terms and conditions as the Administrator finds necessary to carry out the purposes of such orders, to prevent the circumvention or evasion thereof, and to safeguard the minimum wage rates established therein.

#### **STATEMENT**

#### **I. ADMINISTRATIVE PROCEEDINGS LEADING TO THE PROMULGATION OF THE WAGE ORDER FOR THE EMBROIDERIES INDUSTRY**

The wage order for the embroideries industry was issued in accordance with the statutory procedures outlined above. The industry committee unanimously recommended the establishment of a

minimum wage rate of 40 cents an hour for all employees in the embroideries industry. (R. 38-39.) A notice of hearing, published in the Federal Register on September 16, 1942, stated that evidence would be received on the question whether the recommendations of Industry Committee No. 45 should be approved or disapproved (R. 39).

While considering the industry committee's recommendation, the Administrator was required by Section 8 (f) of the Act to determine also what terms and conditions he should include if he issued a wage order establishing the 40-cent minimum wage rate for the industry. Especially, it was necessary to consider the problem of industrial home work, which the Administrator had previously found it necessary to prohibit in six other industries in order to make wage orders effective.<sup>3</sup> Consequently, although the Act does not require a hearing on this issue, the Administrator broadened the scope of the hearing on the industry committee's recommendation so that it would cover the question whether the distribution of industrial home work should be restricted or pro-

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<sup>3</sup> Jewelry Manufacturing Industry, 8 Fed. Reg. 6097; Knitted Outerwear Industry, 7 Fed. Reg. 2592; Women's Apparel Industry, 7 Fed. Reg. 5589; Gloves and Mittens Industry, 7 Fed. Reg. 6713; Button and Buckle Manufacturing Industry, 7 Fed. Reg. 7586; Handkerchief Manufacturing Industry, 8 Fed. Reg. 1187.

hibited in order to prevent evasion of, and safeguard, the 40 cent minimum wage rate (R. 39).

The public hearing consumed 10 full days and two evening sessions. All interested parties were given an opportunity to be heard. Extensive testimony and many exhibits were received in evidence. (R. 39-40.) Thereafter, the Administrator made his findings of fact based on the evidence adduced at the hearing (R. 42-155) and issued the wage order under review (R. 34-39; 8 Fed. Reg. 12126).

## II. THE WAGE ORDER FOR THE EMBROIDERIES INDUSTRY

The chief term of the wage order for the embroideries industry is a provision establishing the rate of 40 cents an hour as the minimum wage to be paid under Section 6 to employees in the industry engaged in interstate commerce or in production of goods for interstate commerce. The order contains a definition of the embroideries industry and also requires the posting of certain notices (R. 36-37). None of these provisions is challenged in the present case.

In addition, the wage order provides (R. 36)—

No work in the Embroideries Industry, as defined herein, shall be done in or about a home, apartment, tenement, or room in a residential establishment after November

15, 1943,<sup>4</sup> except by such persons as have obtained special home work certificates issued pursuant to applicable regulations of the Wage and Hour Division, authorizing industrial home work by a worker who—

(1) (a) Is unable to adjust to factory work because of age or physical or mental disability; or

(b) Is unable to leave home because his presence is required to care for an invalid in the home; *and*

(2) (a) Was engaged in industrial home work in the Industry, as defined, prior to November 2, 1942 (except that if this requirement shall result in unusual hardship to the individual home worker it shall not be applied); or

(b) Is at any time engaged in such industrial home work under the supervision of a State Vocational Rehabilitation Agency or of a Sheltered Work Shop, as defined in § 525.1, Part 525, Chapter V, Title 29, Code of Federal Regulations.

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<sup>4</sup> On November 6, 1943, the date was postponed to March 31, 1944. See 8 Fed. Reg. 15362. Subsequently, the effective date was postponed to May 15, 1944 (see 9 Fed. Reg. 2669), again to June 26, 1944 (see 9 Fed. Reg. 4952), and finally to July 26, 1944 (see 9 Fed. Reg. 7095). The prohibition is now in effect but since the circuit court of appeals stayed its enforcement until this Court should act on the petition for certiorari, the Administrator will take no enforcement action until this Court hands down its opinion.

This prohibition of homework does not prohibit any type of work or occupation but will merely compel the transfer of such work as is now done in the employees' homes from there to the factories or work shops of their employers (R. 152). And the provision for special certificates will avoid imposing hardship upon persons unable to adjust themselves to factory work (R. 153).

### III. THE ADMINISTRATOR'S FINDINGS ON THE EFFECT OF INDUSTRIAL HOME WORK

Industrial homework means manufacture in the home. In the embroideries industry, here involved, as in other industries, the materials worked upon are furnished by the employer, the work is done at home, and the completed product is returned to the employer. The homemaker is to be distinguished from the small entrepreneur who sells his own handiwork. The homemaker sells only his labor. He is an industrial wage earner just as is the factory employee.<sup>5</sup> In the embroideries industry, precisely the same operations performed by some workers at home are also performed by others in the factories or work shops of their employers (R. 153).

<sup>5</sup> O. W. Rosenzweig, *N. R. A. and Industrial Home Work*, Work Materials No. 45, The Labor Program under the N. R. A., Office of National Recovery Administrator, Division of Review, Labor Studies Section (March 1936), pp. 6-7.

In *United States v. Rosenwasser*, No. 103, this Term, the question raised is whether a piece rate worker is an employee within the meaning of the Act. Petitioners do not contend that the homeworkers here involved are not employees.

In the instant case, the Administrator made an exhaustive study of the effect of homework on the establishment of a 40 cent minimum wage for the embroideries industry and of the effect of any prohibition of homework upon both employees and employers. His findings may be summarized as follows:

A. *Extent to which home work is practiced in the embroideries industry.*—Homework in the embroideries industry is distributed to the workers directly by regular embroidery manufacturers or contractors who have their own shops, and indirectly through contract shops or distributors (R. 80-81). The number of homework employees per firm varies greatly; in New York the average per firm is 26 workers; in Pennsylvania, the average is nine (R. 80). In the years immediately prior to the administrative hearing, the practice of distributing embroidery work among homes was widespread in the industry. In June 1942, there were 18,500 factory workers. The number of employees working at home, which cannot be ascertained precisely, ranged upwards from 8,500—35 per cent of the total. Some 70 per cent of the homeworkers were employed by New York firms; 17 per cent by employers in New Jersey, and the rest were scattered throughout other States. (R. 79.) The proportion of home work employees to all employees, however, has not always been so high; for example, N. R. A. codes for four

branches of the industry prohibited homework and thus concentrated a greater proportion of the work in the work shops or factories (R. 109-110).

B. *The effect of home work on minimum wage standards in the embroideries industry.*—Experience under the Fair Labor Standards Act and under an earlier wage order issued pursuant to it, has demonstrated that the practice of distributing work to employees in their homes results in “wholesale violation of the record-keeping and minimum wage requirements of the Act and regulations” and furnishes “a ready means of circumventing or evading the minimum wage order” (R. 117). This was established by inspections made of 222 firms in the industry during the period between May 1, 1941 and May 1, 1942. Only three per cent of the firms were found to be in compliance. (R. 98.) Ninety-five per cent of the employers had not kept records at all or had kept inadequate or inaccurate records. Even though special record keeping regulations had been issued providing for the use of handbooks in which employees could record their hours of work and earnings, 46 per cent of the employers had not used handbooks. Many others had failed to keep proper records of home workers’ hours of work, a basic requisite in determining compliance. In addition, there was evidence that records were being falsified; this was done, for example, by recording as hours

worked not the actual number but a fictitious figure determined by dividing the weekly earnings by the prevailing minimum wage. (R. 98-99.)

Violations of the minimum wage rates fixed in the prior order (as distinguished from record keeping violations) were also widespread (R. 103, 117). A survey conducted by the Economics Branch of the Wage and Hour Division showed that even in the 18 month boom period which the industry enjoyed between January 1941 and July 1942, more than 60 percent of the homeworkers were paid less than 37½ cents an hour in violation of the wage order then applicable (R. 102). Approximately a third of the homeworkers received less than 25 cents an hour—12½ cents below the minimum; one-sixth received less than 20 cents, and in some instances—1.8 per cent of the total—the employers did not pay even 10 cents an hour for the work (R. 102).

A survey by the New York State Department of Labor confirmed these findings of the Wage and Hour Division (R. 103, 107). The violations extended to all branches and operations in the industry (R. 103-108).<sup>6</sup>

<sup>6</sup>The figures cited on p. 4 of petitioners' brief from the Annual Reports of the Wage and Hour Division are in no sense comparable to the minimum wage violations discussed above. The figures in the Reports show the number of establishments found in violation. Thus a large factory might be shown in violation because one employee was misclassified as an executive even though all the rest of the employees, perhaps hundreds in number, were classified and

The apparent impossibility of enforcing a minimum wage among homeworkers is due in large part, of course, to the opportunities for evasion which the practice of employing homeworkers affords to the unscrupulous seeking unfair competitive advantages. The problem also arises, however, from the difficulties inherent in the varied circumstances under which homework is performed and in the lack of supervision, both of which make it impossible for well-intentioned employers as well as government inspectors to obtain accurate knowledge as to how homeworkers spend their time, under what conditions they work, and what help they secure from other persons. (R. 130.)

For one thing, payment is on a piece-work basis and it is impossible to fix rates for homeworkers which will yield the least skilled worker the minimum without paying the skilled worker an uneconomical wage. The industry is dependent upon novel variations in designs and for each design a new rate must be set. A common practice is to time a sample worker in the factory and to apply the rate thus obtained to the same work when the operation is done in a paid in accordance with the Act. This is true in a very great number of cases shown in the Annual Reports. On the other hand, the figures on minimum wage violations in the embroidery industry, stated above, show that more than 60% of the homework employees were not paid the prescribed minimum.

home. Other employers merely fix an arbitrary rate. Inevitably, the actual hourly earnings of the homeworkers vary widely from these standards and among themselves. Homework conditions are not subject to control or standardization as are those in a factory, yet the conditions under which a task is done govern in large part the speed with which it is accomplished and thus affect the hourly earnings of the employee. Moreover, the homeworkers themselves differ greatly in skill, productivity, and efficiency; methods of operation vary among homeworkers, whereas, in a factory, the most efficient techniques can be singled out and taught to all. (R. 117-130.) As a result "piece rates cannot practically be set so as to reflect accurately the hours of work of the home worker or secure reliably a definite hourly wage" (R. 117).

The problem would not be solved by requiring that "make up" be paid to the slower workers because it is virtually impossible to determine their hours of work.<sup>7</sup> The lack of employer supervision, the participation of other persons in picking up and delivering work (which is regarded as work time (R. 115)), the frequent participation of other members of the family in doing the home-

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<sup>7</sup> In a number of industries paying wages on a piece-work basis, slow employees are not able to earn the minimum wage at the established piece rates. Since an accurate check can be made of their hours of work, they are paid "make up" in order to meet the statutory requirements.

worker's work, as well as the intermittent character of homework itself, all make it a practical impossibility for either employer or employee to keep an accurate check of the time worked and the wages due to make up the established minimum (R. 122). One homemaker, for example, who believed that she had been paid the applicable minimum and was called by her employer to testify against the proposal to restrict homework, was found to have earned considerably less than the minimum (R. 126-130, compare R. 104-105). Furthermore, fear of loss of employment induces many homeworkers to refrain from reporting time worked in excess of the time which the employer indicates should be required (R. 125).

For these reasons, regulation of homework, even if it included more stringent control of record-keeping practices or governmental establishment of piece rates, would not be adequate to secure effective enforcement of the minimum hourly wage (R. 130).

But the problem is not simply to secure payment of the minimum wage rate for the homeworkers alone. If the 40-cent minimum were not paid to the homeworkers, employers of factory labor would suffer a competitive disadvantage, thereby undermining the wage structure throughout the industry and thwarting the purposes of the order and the Act. Thus, the Administrator found that "The evidence adduced at the hearing con-

clusively shows that large proportions of home work employees in the Embroideries Industry and in all of its branches are paid less than the applicable minimum. It is apparent that if some employers are allowed to utilize home workers at subminimum wage scales, other employers compelled to pay a 40-cent minimum will be placed at a competitive disadvantage." (R. 130-131.)

C. *The possibility of adjustment to factory production.*—Experience in comparable industries has shown that the transfer of work from home to factory can be accomplished without hardship to employees or their employers. After homework was prohibited in the men's neckwear and men's clothing industries by regulations issued under the National Industrial Recovery Act, the Department of Labor conducted a survey which revealed that probably 80 percent of the homeworkers were thereafter employed in factories, and only one firm ceased business. In the men's clothing industry, 94 percent of the homeworkers transferred to factory operation. The homeworkers who shifted to the factory found little trouble in self-adjustment irrespective of age, and output improved in quantity and quality. Hourly earnings increased as much as 200 percent. (R. 137-138.)

Similar experience has been reported in the administration of laws restricting the employment of homeworkers in Rhode Island, New Jersey, and New York (R. 138). In Rhode Island, for ex-

When the decision below was handed down, petitioners moved for an order staying the Administrator from taking any action to enforce the prohibition against homework. The Administrator opposed the stay on the ground that in any event he can take no enforcement action except to file suit for an injunction under Section 17 of the Act. He argued that if he were free to file such suits, he could deal therein, while this Court had the principal matter before it, with all the other legal objections to enforcement that petitioners might raise and thus bring the suits to the point of actual enforcement by final decree. Petitioners, for their part, would not be injured, because when the Section 17 actions reached the point of final decrees supersedeas or stays of enforcement could be granted until the question raised here was decided. This course would prevent dilatory tactics by employers in the industry and ensure prompt enforcement upon a final decision by this Court. Nevertheless, the stay was granted.

In these circumstances it is desirable that the case be heard on the merits at an early date, if certiorari is granted.<sup>7</sup> The wage order will expire on October 23, 1945, and under the view that the prohibition of home work is ancillary to a wage

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<sup>7</sup> In addition, it should be pointed out that so long as this case is pending, there will be uncertainty as to the validity of the provisions prohibiting industrial homework in five other wage orders. See p. 5, n. 2, *supra*.

order and not to the statutory minimum, the prohibition cannot be extended thereafter. To advance the case in the interest of an early decision will make it possible to enforce the order against recalcitrant members of the industry if the decision below is affirmed. Timely compliance with the prohibition, enforcement of which is now stayed pending review, would not only check current evasions of the minimum wage but would as a practical matter diminish the likelihood of similar future evasions of the statutory wage after the prohibition of home work has expired but while the statutory minimum remains in force. For experience shows, as we have pointed out, that the distribution of industrial home work, once abandoned, is not likely to be resumed.

#### CONCLUSION

While we do not oppose the granting of a writ of certiorari, we submit that the decision of the circuit court of appeals is correct.

Respectfully submitted.

✓  
✓  
CHARLES FAHY,  
*Solicitor General.*

DOUGLAS B. MAGGS,  
*Solicitor,*  
*Department of Labor.*

OCTOBER 1944.

Nos. 368, 369, 370

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*In the Supreme Court of the United States*

OCTOBER TERM, 1944

GEMSO, INC., ET AL., PETITIONERS

v.

L. METCALFE WALLING, ADMINISTRATOR OF THE  
WAGE AND HOUR DIVISION, UNITED STATES  
DEPARTMENT OF LABOR

MILDRED MARETZO, ET AL., PETITIONERS

v.

L. METCALFE WALLING, ADMINISTRATOR OF THE  
WAGE AND HOUR DIVISION, UNITED STATES  
DEPARTMENT OF LABOR

JOSEPHINE GUISEPPI, ET AL., PETITIONERS

v.

L. METCALFE WALLING, ADMINISTRATOR OF THE  
WAGE AND HOUR DIVISION, UNITED STATES  
DEPARTMENT OF LABOR

ON WRITS OF CERTIORARI TO THE UNITED STATES CIR-  
CUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

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# In the Supreme Court of the United States

OCTOBER TERM, 1944

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No. 368

GEMSCO, INC., ET AL., PETITIONERS

v.

L. METCALFE WALLING, ADMINISTRATOR OF THE  
WAGE AND HOUR DIVISION, UNITED STATES DE-  
PARTMENT OF LABOR<sup>1</sup>

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ON WRITS OF CERTIORARI TO THE UNITED STATES CIR-  
CUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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## BRIEF FOR RESPONDENT

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### OPINIONS BELOW

The principal opinion below (R. 189-219) was written by Judge Frank. Judge Learned Hand delivered a concurring opinion (R. 219-221). Judge Swan delivered a dissenting opinion (R.

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<sup>1</sup> Together with No. 369, *Mildred Maretzo, et al., Petitioners v. L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor*, and No. 370, *Josephine Guiseppe, et al., Petitioners v. L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor*.

ample, the Department of Labor issued a wage order in 1938 establishing minimum wages for women and minors in the wearing apparel and accessories industry and, in order to safeguard the minimum, the wage order included a term prohibiting industrial homework. The wage order covered "embroidery operations" performed on underwear, handkerchiefs, infants' and children's clothing, women's dresses and gift novelties. The manufacturers of these articles experienced no difficulty in bringing homeworkers into the factories, and the Rhode Island industry has continued to grow. (R. 140.)

Conditions in the embroideries industry generally and in each of its branches also indicate specifically that the members of the industry will not encounter any great difficulties in adjusting their methods of doing business to the prohibition of industrial homework, and that they will not suffer undue hardship or competitive disadvantage. Contrary to the contention of Gemseo and the other military embroiderers, there will be no decrease of production. "The evidence in the record not only does not support any such contention, but indicates rather that production of these types of embroidery may be stimulated and increased." (R. 152.)

From the foregoing subsidiary findings and from all the evidence, the Administrator drew two conclusions of decisive importance in the present case. He concluded that a prohibition of

homework in the embroideries industry was necessary to safeguard the 40 cent minimum wage (R. 154)—

that it is necessary, in order to carry out the purposes of the minimum wage order for the Embroideries Industry, to prevent the circumvention or evasion thereof, and to safeguard the [40-cent] minimum wage rate prescribed therein, to include terms and conditions in the order which shall provide that no work in the Embroideries Industry shall be done in or about a home, apartment, tenement or room in a residential establishment \* \* \* [except in certain specified extraordinary cases].

He also concluded that the prohibition of homework would not cause substantial difficulties (R. 137, 152, 152-153)—

I have considered all the evidence relating to adjustment to the factory system of manufacture and find that this adjustment can reasonably be made without undue hardship upon home workers or home work employers.

\* \* \* \* \*

I have already found that prohibition of home work will not involve any substantial difficulties in the Industry.

\* \* \* \* \*

Prohibition of home work will not prohibit any type of work or occupation but will merely compel the transfer of work

and occupations formerly carried on in the homes to the factory where the workers may be adequately supervised and their payment in accordance with the minimum wage order for the Industry guaranteed. The possibilities of adjustment to a prohibition of home work which are disclosed by the record furnish ample assurance that no substantial curtailment of operation will result. All of the operations in question are performed in the factory as well as in the home.

Thereupon the Administrator approved the 40-cent minimum wage recommended by the industry committee and issued the wage order under review.

#### IV. PROCEEDINGS IN THE CIRCUIT COURT OF APPEALS

After promulgation of the wage order, petitioners filed petitions for review of the order in the circuit court of appeals, pursuant to Section 10 of the Act, challenging the power of the Administrator to include in the order the terms prohibiting homework (R. 7-32). Petitioners conceded that such provisions were necessary to prevent evasion of the wage order and to safeguard the wage rate therein established but denied that there was power to deal with the evil. The circuit court of appeals affirmed the wage order in all respects (R. 225-226).

**SUMMARY OF ARGUMENT**

The purpose of the wage order for the embroideries industry is to raise the minimum wage in the industry to 40 cents an hour. The prohibition of homework is directed exclusively to the effectuation of this end. In this industry a 40 cent minimum wage order, without a prohibition of homework, would be a nullity because it could not be enforced. The validity of the prohibition, therefore, must be judged not as if the prohibition were an independent measure promulgated because home work is an evil but as an indispensable means of safeguarding the minimum wage.

The prohibition is authorized by Section 8 (f) of the Act, which empowers the Administrator to include in wage orders "such terms and conditions" as he finds "necessary to carry out the purposes of such orders, to prevent the circumvention or evasion thereof, and to safeguard the minimum wage rates established therein." The authority delegated by this Section is limited only by the language quoted. Congress could not catalogue all the devices or practices that would circumvent a wage order or answer the detailed questions of judgment and policy involved in determining in each situation what enforcement measures would be appropriate. For these reasons, Section 8 (f) leaves to the Administrator the task of determining what terms and conditions are to be included in each wage order for

a particular industry for the purpose of preventing its frustration. In the embroideries industry, the Administrator has found that the practice of distributing homework would render the 40 cent minimum wage rate a nullity. He has also concluded that the prohibition "will not involve any substantial difficulties in the industry" (R. 152). These findings are not challenged. Upon making them, the Administrator had, under the express language of Section 8 (f), not only the power but also the duty to include in the wage order the prohibition in question.

The background and legislative history of the Act bear out this conclusion. At the time the Fair Labor Standards Act was before Congress, it was fully understood that in some industries the practice of distributing industrial homework resulted in such widespread evasion of minimum wage laws that the rates could not be made effective unless homework was abolished or sharply curtailed. At various stages in the course of the bill through Congress, Congress illustrated the kinds of terms authorized by Section 8 (f) by listing some of them in a parenthetical clause. The prohibition of homework was included in the illustrations. For example, the Senate bill provided that labor standards orders should contain "such terms and conditions (including the restriction or prohibition of industrial home work or of such other acts or practices) as the Board

finds necessary to carry out the purposes of the order and prevent the circumvention or evasion thereof \* \* \*." In Conference, this "illustrative application of the general principle" (*Federal Land Bank v. Bismarck Co.*, 314 U. S. 95, 100) was omitted, but its prior mention shows beyond dispute that a prohibition of homework is a term or condition of the kind which Congress intended by Section 8 (f) to authorize the Administrator to include in a wage order whenever he finds it to be necessary to prevent evasion. The opposing argument—that the omission worked a substantive change—is not persuasive. The Conference Committee omitted at the same time the entire parenthetical phrase contained in the Senate bill. Surely, it did not by the deletion signify that the Administrator was to have no power to prohibit any acts or practices leading to evasion. Neither does the parallel omission of the reference to homework have any such significance.

Petitioner contends that Congress provided no method for enforcing the prohibition of homework and that therefore, Congress cannot have intended to authorize the prohibition. But Section 17, which confers on the district courts "jurisdiction \* \* \* to restrain violations of section 15", provides for such enforcement. The choice of remedies to be used in enforcing the restraint is left to the discretion of the equity court in accordance with the normal practices. Non-

payment of the wage rates fixed by a wage order is a violation of Section 15 and, therefore, in exercising their "jurisdiction" to restrain such non-payment, the courts may enforce by decree all the provisions in a wage order which the Administrator has found necessary to ensure that the minimum wage rate will be paid.

It is also said that the Administrator will have no power to prohibit industrial homework seven years after the effective date of the Act and that therefore Congress cannot have intended him to have the power during the seven year period. Assuming the premise, we submit that the conclusion does not follow. Under Section 8 (f) all evasive acts and practices stand on the same footing, and the absence from Section 6 of any analogue expressly authorizing the Administrator to regulate practices evasive of the statutory rates, surely does not show that Congress intended Section 8 (f) to be wholly nugatory. The Act was a compromise between the Senate plan for administrative regulation of wage rates and the House scheme for fixing rigid statutory minima without provision for wage orders. It would not be surprising, therefore, to find that the power given to the Administrator in connection with his authority to issue administrative wage orders was not conferred in those parts of the bill which were drawn from the proposal to fix rigid statutory rates without administrative action. The absence of perfect symmetry is not sufficient reason for

deleting Section 8 (f) from the statute. Neither does it give any ground for reading Section 8 (f) to give the Administrator less power to deal with the distribution of homework than he has to prevent other evasive practices.

We submit, moreover—although we think the question need not be decided—that wage order prohibitions of industrial homework will not become ineffective seven years after the effective date of the Act. At the time of enactment, Congress must have realized that, before the the expiration of seven years, the Administrator, following the scheme of Section 8, would have covered all industries with wage orders and have included in them many terms and conditions necessary to prevent evasion of the wage rates established. Section 8 (e) which provides that “No order” shall continue in effect after the expiration of the seven year period was not intended to accomplish the absurd result of striking down all the terms and conditions necessary to make the wage rates effective and to leave the Administrator powerless thereafter to prevent evasion except as he might obtain the assistance of equity. The legislative history of Section 8 (e) shows plainly that its only purpose was to guarantee that attainment of the goal of a universal minimum wage of 40 cents an hour would not be delayed by administrative inertia after the expiration of the seven year period. The intention of Congress can and should be carried out by reading Section 8 (e) as applicable

only to those provisions of wage orders which specify the wage rates and as not applicable to the enforcement provisions with which Section 8 (e) is in no substantial sense concerned. *Armstrong Co. v. Nu-Enamel Corp.*, 305 U. S. 315.

## ARGUMENT

### I

#### THE WAGE ORDER FOR THE EMBROIDERIES INDUSTRY IS VALID IN ALL RESPECTS

The purpose of the wage order for the embroideries industry is to raise the wage rates in the industry, in accordance with Section 8 of the Act, to "the highest minimum wage rates [not in excess of 40 cents an hour] \* \* \* which \* \* \*, having due regard to economic and competitive conditions, will not substantially curtail employment in the industry" (Section 8 (b)). The provision of the wage order prohibiting home-work is directed exclusively to safeguarding the minimum wage rate. The Administrator emphasized in his findings that he had confined himself to the question of the effect of home-work on the minimum wage rate and had not taken into account its other social and economic evils (R. 75-76).<sup>\*</sup> As Judge Frank pointed out,

<sup>\*</sup> The Administrator stated (R. 75-76):

This proceeding is not concerned with the question whether home work is desirable or undesirable from a social point of view or as a form of economic organization. It is concerned solely with whether the home

"This is not a case, then, where an effort is being made to utilize § 8 (f) as a subterfuge to achieve an independent end outside the scope of the Act; the regulation here is a means of accomplishing the purpose of an authorized wage order by stopping evasions of that order \* \* \*. Nor, in view of the Administrator's findings, can it be said that this is a case where the means are so disproportionate to the authorized end that they cease to be means except in form and in truth become an independent end not contemplated in the Act." (R. 197-198.) The sole question, therefore, is whether the Administrator had power to include the prohibition of homework as a subsidiary term or condition necessary to prevent evasion of a lawful order establishing the 40 cent minimum wage.

*A. The prohibition of industrial home work was authorized under Section 8 (f) as a necessary incident to establishment of the 40-cent minimum wage.*

Section 8 (f) of the Fair Labor Standards Act provides:

Orders issued under this section \* \* \* shall contain such terms and conditions as

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work system in the Embroideries Industry furnishes a means of circumventing or evading a wage order putting into effect the minimum wage recommendation of Industry Committee No. 45 so that it is necessary to provide in the wage order for its regulation, restriction, or prohibition in order to carry out the purposes of such order and to safeguard the minimum wage rate established therein.

the Administrator finds necessary to carry out the purposes of such orders, to prevent the circumvention or evasion thereof, and to safeguard the minimum wage rates established therein. \* \* \*

Thus, all that Section 8 (f) requires as prerequisite to the inclusion of any term or condition in a wage order is that the term be found "necessary to carry out the purposes of such orders, to prevent the circumvention or evasion thereof, and to safeguard the minimum wage rates established therein."

In the instant case, the Administrator made such a finding. He found that the prohibition was an indispensable means of preventing evasion of the 40-cent minimum wage rate, and that the industry could make the necessary adjustments without "undue hardship" or "substantial difficulties" (R. 134, 137, 152). He then concluded, in the precise words of Section 8 (f), that (R. 154)—

\* \* \* it is necessary, in order to carry out the purposes of the minimum wage order for the Embroideries Industry, to prevent the circumvention or evasion thereof, and to safeguard the [40 cent] minimum wage rate prescribed therein, to include terms and conditions in the order which shall provide that no work in the Embroideries Industry shall be done in or about a home, apartment, tenement or room in a residential establishment \* \* \*

[except in certain specified extraordinary cases].

The validity of this finding seems clear. Petitioners do not dispute its correctness. By not bringing the evidence to the court below, they waived any contention that it lacks an adequate basis. *Railroad Comm. v. Pacific Gas & Electric Co.*, 302 U. S. 388, 392, 398, 401. The evidence, moreover, as shown by the subsidiary findings in the record (R. 75-155), does in fact amply support the Administrator's ultimate finding that the unrestricted distribution of industrial homework would render meaningless any order aimed at establishing a 40 cent minimum wage rate in the embroideries industry.

It follows that the term prohibiting industrial homework was validly included in the wage order under review. Section 8 (f) does not qualify the authority expressly delegated to the Administrator to include in wage orders "such terms and conditions as the Administrator finds necessary \* \* \*". It cannot be read to authorize some necessary incidental provisions and to deny recourse to others that are equally essential. Congress, which must have realized that a great variety of terms, including terms prohibiting homework, were used to implement state wage orders,<sup>9</sup> charged the Administrator

<sup>9</sup> Previous prohibitions of industrial homework to implement state minimum wage legislation are discussed at pp. 36-41, *infra*. Other terms and conditions which the States

with the duty of including any "necessary" terms or conditions. The Administrator found the prohibition of industrial homework to be "necessary". That finding is true beyond question. Therefore the provision is within the statute.

In making this contention we assume, of course, that Section 8 (f) implicitly limits the terms and conditions that a wage order may include to those that are truly incidental to safeguarding the wage rate; doubtless a danger of evasion may not be used under that section as an excuse for regulating some distinct subject in such a way that the resulting term or provision is out of all proportion to protection of the wage rate. But what is an independent subject and what is appropriate for incidental regulation depends on questions of fact and degree, and ultimately on decisions of policy, all of which are primarily for the Administrator's sense of proportion. Congress could not catalogue all the devices or practices that would circumvent the purposes of a wage order. Neither could Congress answer the detailed questions of judgment and policy involved in determining in each situation what enforcement measures would be appropriate. Congress met these difficulties by leaving the adapta-

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have found necessary for enforcement deal with tipping, charges for facilities, charges for uniforms, waiting time, posting of orders, *et cetera*.

tion of means to end to the empiric process of administration. For these reasons, Section 8 (f) delegates to the Administrator the task of determining what terms and conditions should be included to prevent the frustration of specific orders for particular industries.

In promulgating the wage order in question the Administrator fairly discharged his duty. He kept in proper perspective the means and the end to be attained. He considered not only whether the prohibition was essential to the prevention of evasion but also whether it was too disruptive a method of safeguarding the wage rate to be properly related to that authorized object. After reviewing the evidence, he found that the practice of distributing work for employees to do in their homes made it impossible, because of the very nature of homework, to secure for them payment of the minimum wage rate fixed by the order (R. 130, 134). He then inquired into the consequences of a prohibition of homework, obviously with a view to determining whether the practice of distributing work to employees in their homes rather than bringing them to shops or factories was so important to employers and homeworkers in the industry as to make it improper to deal with the subject in one of the incidental provisions of the wage order (R. 136-153). He found that it was not so important. While in terms of enforcement of the minimum wage rate

and of the indirect social gain, the consequences of prohibition are tremendous, nevertheless, in terms of the importance of home work to the industry, any disturbing consequences of a prohibition are comparatively small. The prohibition does not forbid the pursuit of any particular occupation. It does not outlaw any particular kind of embroidery or working technique. It does not restrain former homeworkers from seeking continued employment in the embroidery industry. It permits all who wish to do so to take employment in a factory or workshop. The prohibition relates exclusively to the place where work may be performed (R. 152). In the case of persons who are unable to accept such employment because of age, or physical or mental disability, or inability to leave home, the order makes provision for special homework certificates. The basic questions before the Administrator, therefore, in seeking to determine whether the effect of prohibition upon the industry would be too radical to permit its use as a means of stopping evasion, were whether adequate space would be available for workshops and whether the workers would make the shift. After hearing testimony based on experience and expert knowledge (R. 136-153; see pp. 15-16, *supra*), the Administrator concluded that the evidence showed that both the employers and employees can readily adjust themselves to the requirement that all work be done in shops and

factories where payment of the minimum wage can be assured: "prohibition of home work will not involve any substantial difficulties in the Industry" (R. 152); the necessary adjustments "can reasonably be made without undue hardship upon home workers or home work employers" (R. 137). In view of these underlying determinations, the Administrator's formal finding, stated in the words of Section 8 (f) (R. 154), must be regarded as the expression of his conclusion (a) that the prohibition is absolutely necessary to safeguard the minimum wage established by the order and (b) that the practice of employing workers in their homes rather than in shops or factories is of no such consequence to the embroideries industry as would render its prohibition an inappropriate method of preventing evasion of the 40 cent minimum wage.

The latter portion of the finding, no less than the former, is binding in this proceeding for review (see *supra*, p. 27). When Judge Swan stated that the prohibition "will disorganize and make over the industry, break up much family economy, and produce conditions which cannot possibly adjust themselves' for a considerable period of time" (R. 223), he fell into the error of substituting his own judgment as to the consequences of the prohibition. But the Administrator had already considered petitioners' claims that the prohibition was too drastic and had determined

that their fears were unfounded (R. 151, 152). What was said by this Court in *Phelps Dodge Corp. v. National Labor Relations Board*, 313 U. S. 177, 194, is apposite here—

\* \* \* in the nature of things Congress could not catalogue all the devices and stratagems for circumventing the policies of the Act. Nor could it define the whole gamut of remedies to effectuate these policies in an infinite variety of specific situations. Congress met these difficulties by leaving the adaptation of means to end to the empiric process of administration. The exercise of the process was committed to the Board, subject to limited judicial review. Because the relation of remedy to policy is peculiarly a matter for administrative competence, courts must not enter the allowable area of the Board's discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy \* \* \*.

The *Phelps Dodge* case involved a quasi-judicial hearing. But the considerations there adverted to "are especially appropriate where the review", as here, "is of regulations of general application adopted by an administrative agency under its rule-making power in carrying out the policy of a statute with whose enforcement it is charged." *Federal Security Administrator v. Quaker Oats Co.*, 318 U. S. 218, 228. Cf. *Morgan*

*Stanley & Co. v. Securities Exchange Commission*, 126 F. (2d) 325, 332 (C. C. A. 2); *Gray v. Powell*, 314 U. S. 402; *Steuart & Bro. v. Bowies*, 322 U. S. 398. Under Section 8 (f), the relation of means to end—the preservation of a proper proportion—is the task of the Administrator.

For the foregoing reasons we submit that the plain words of Section 8 (f), read ~~in~~ the light of the general principles of administrative law, demonstrate that no part of the wage order under review should be set aside. Certainly, on the facts disclosed by this record, the term eliminating homework is within the provision authorizing the Administrator to include “such terms and conditions as” he finds “necessary to carry out the purposes of such orders, to prevent circumvention or evasion thereof, and to safeguard the minimum wage rates established therein.” These unqualified words could be limited only by a strong showing that Congress did not intend them to be given their full scope. As we demonstrate hereafter, no such showing can be made.

*B. The background and legislative history of the Act show affirmatively that Congress, by enacting Section 8 (f), intended to authorize a necessary prohibition of industrial home work.*

The background of social and economic thought from which the Fair Labor Standards Act emerged, supports our interpretation of Section 8 (f). The long struggle to remedy the unsanitary sweat-shop conditions under which urban

homeworkers and their children were forced to work in poverty for unending hours, not only creating a constant threat to their own and their children's health and well-being but also spreading disease to those who bought their goods <sup>10</sup> has

<sup>10</sup> *Homework in the Tenements*, by Elizabeth C. Watson, reprinted from *The Survey*, New York, of February 4, 1911 by the National Consumers' League; *Manufacturing in Tenements*, Preliminary Report of the Factory Investigating Commission, No. 30, State of New York, pp. 87-91 (1912); *Artificial Flower Makers*, by Mary Van Kleeck, Secretary, Committee on Women's Work, Russell Sage Foundation, pp. 222-223 (1913); *Industrial Home Work in Massachusetts*, Labor Bulletin No. 101 (Being Part V of the Annual Report on the Statistics of Labor for 1914), pp. 6, 21-22, Bureau of Statistics, The Commonwealth of Massachusetts; *The Manufacture of Army Shirts under the Home Work System. Jeffersonville, Indiana*. Committee on Women in Industry of the Advisory Commission of the Council of National Defense, Women in War Industries Series, No. 1, p. 24 (July 1918); *Industrial Home Work in Pennsylvania*, by Agnes Mary Hadden Byrnes, prepared through the co-operation of the Department of Labor and Industry, Commonwealth of Pennsylvania, the Consumers' League of Eastern Pennsylvania, and the Carola Woerishoffer Graduate Department of Social Economy and Social Research, Bryn Mawr College, pp. 56-89 (1920); *Home Work in Bridgeport, Connecticut*, Bulletin No. 9, Women's Bureau, United States Department of Labor, p. 6 (December 1919); *Tenement Home Work and a New Bill Initiated by the Women's City Club and the City Club of New York* (1921); Report on *Manufacturing in Tenements* Submitted to the Commission to Examine the Laws Relating to Child Welfare, by Bernard L. Schientag, Industrial Commissioner, New York State Department of Labor, pp. 4-5, (March 1924); *Some Social and Economic Aspects of Home Work*, Special Bulletin No. 158, Bureau of Women in Industry, New York State Department of Labor, pp. 31-32, 34-40, (February 1929); *Homework in the Connecticut Lace Industry*, Minimum Wage Division, Connecticut State Department of Labor and Fac-

had two aspects. The first, the necessity quite apart from minimum wage legislation for abolishing homework to remove its threat to health, safety and child welfare, is not strictly relevant here.<sup>11</sup> What is both relevant and highly important is the second aspect, the need in some industries for regulating or prohibiting industrial homework in order to make minimum wage laws

tory Inspection, pp. 8-9, 15-20 (November 1933); *Industrial Home Work; Summary of the System and its Problems*, Women's Bureau, United States Department of Labor, pp. 1-3 (July 1934); *Three Cents an Hour*, Bureau of Women and Children, Department of Labor and Industry, Commonwealth of Pennsylvania (1936); *The Commercialization of the Home Through Industrial Home Work*, Bulletin No. 135, Women's Bureau, United States Department of Labor, pp. 17-26, 33-34 (1935); *Industrial Home Work in Chicago*, by Ruth White, The Social Service Review, University of Chicago Press, Vol. X, pp. 23-58 (1936); *Industrial Home-Work Conditions in the Candlewick-Bedspread and Lace Industries*, Children's Bureau, United States Department of Labor, pp. 2-4 (May 1941); *Home Work in the Glove Industry in New York State*, Division of Women in Industry and Minimum Wage, New York State Department of Labor, Vol. I, pp. 191-193 (May 1941); *An Industry Adjusts; a study of the adjustment of the artificial flower industry to homework order no. 3*, Division of Women in Industry and Minimum Wage, New York State Department of Labor, pp. 1-3, 5, (June 1941); see also *Industrial Home Work in the United States*, by Frieda S. Miller, International Labour Review, Vol. XLIII, No. 1, pp. 1-50 (January 1941); *Labor Problems in American Industry*, by Carroll R. Daugherty (Houghton Mifflin Co.) (1941, fifth ed.), pp. 222-224; *Labor Problems and Labor Law*, by Albion Guilford Taylor (Prentice-Hall, Inc.) (1938), pp. 411-416; *Labor's Progress and some Basic Labor Problems*, The Economics of Labor, Vol. I, by Harry A. Millis and Royal E. Montgomery (McGraw-Hill Book Co., Inc.) (1938) pp. 397-402.

<sup>11</sup> Acts and Resolves of Massachusetts (1937), Ch. 429, Sec.

effective. When the Fair Labor Standards Act was before Congress, it was fully understood that in such cases minimum wage regulation could not be successful unless, as an ancillary measure, the practice of distributing industrial homework was abolished or sharply curtailed.<sup>12</sup> In other words, 144, illustrates this type of regulation. It provides:

The manufacture of any of the following by industrial home work shall be unlawful, and no permit issued under section 147, or certificate issued under section 147A shall be deemed to authorize such manufacture or the delivery of materials for such manufacture: tobacco; drugs and poisons; bandages and other sanitary goods; explosives, fireworks and articles of like character; articles, the manufacture of which by industrial home work is determined by the commission, after investigation and hearing in a manner provided by sections 145 and 146 to be injurious to the health or welfare of the industrial home workers within the industry or to render unduly difficult the maintenance of existing labor standards \* \* \*

See also Ill. Rev. Stat. (1941) Ch. 48, Secs. 251-260; Laws of Pennsylvania (1937), Act. No. 176, Secs. 1, 4; Vernon's Texas Statutes, Cum. Supp. (1939), Tit. 12, Ch. 11, Art. 782a, Secs. 2, 3; Wisconsin Stats. (1937), Secs. 103.44, 103.69 and 146.03.

<sup>12</sup> *Industrial Home Work in Massachusetts*, Labor Bulletin No. 101 (Being Part V of the Annual Report on the Statistics of Labor for 1914), pp. 30-31, Bureau of Statistics, The Commonwealth of Massachusetts; *Industrial Homework and its Regulation in Massachusetts*, by Ethel M. Johnson, Assistant Commissioner, Massachusetts Department of Labor and Industries, pp. 3, 13 (1927); *Homework in the Connecticut Lace Industry*, Minimum Wage Division, Connecticut State Department of Labor and Factory Inspection, pp. 15-18 (1933); *Industrial Home Work in Pennsylvania under the*


it was well established, even then, that a prohibition or restriction upon homework was one of the terms or conditions which it might be necessary to include in the minimum wage orders for some industries in order to make the orders effective.

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N. R. A., Bureau of Women and Children, Gertrude Emery, Director, Pennsylvania Department of Labor and Industry, pp. 16-22 (March, 1935); *Industrial Home Work in Rhode Island*, Bulletin No. 131, Women's Bureau, United States Department of Labor, pp. 10-15 (1935); *Industrial Home Work under the N. R. A.*, Publication No. 234, Children's Bureau, United States Department of Labor, pp. 13-18 (1936); *Report of the Wage Board of the Jewelry Manufacturing Industry to L. Metcalfe Walling, Director of Labor, Rhode Island*, (January 4, 1937); *Homework in the Artificial Flower and Feather Industry in New York State*, Special Bulletin No. 199, Division of Women in Industry and Minimum Wage, New York State Department of Labor, pp. 15-16, 72-75 (1938); *Current Status of Industrial Home Work in the Women's and Children's Apparel Industry*, Research and Statistics Branch, Wage and Hour Division, United States Department of Labor, pp. 100-103 (March, 1942); *Industrial Home-Work Conditions in the Candlewick-Redspread and Lace Industries*, Children's Bureau, United States Department of Labor, pp. 2-4 (May, 1941); *A Study of Industrial Homework in the Summer and Fall of 1934*, A Preliminary Report to the National Recovery Administration, United States Department of Labor, pp. 3268-5, 3268-6, 3268-44 to 3268-46, 3268-54 to 3268-59, 3268-61 (1934); *Aspects of Industrial Homework in Apparel Trades*, by Lazare Teper and Nathan Weinberg, Research Department, International Ladies' Garment Workers' Union, pp. 14-19, 28-31 (July, 1941); *An Industry Adjusts; a study of the adjustment of the artificial flower industry to homework order no. 3*, Division of Women in Industry and Minimum Wage, New York State Department of Labor, pp. 21-30 (June, 1941).

In the federal sphere the need had been recognized in 1933. Under the National Recovery Administration, homework was prohibited in many industries, including four branches of the embroidery industry (R. 137), because it threatened the attempt to establish fair minimum wages: "Manufacturers who favored the code clauses prohibiting homework were usually motivated by a desire to eliminate homework as a source of 'unfair competition.' Organized labor \* \* \* opposed homework as a menace to higher standards of wages and hours and improved working conditions." (*Rosenzweig, op. cit. supra*, p. 34).

State legislation contemporary with the Fair Labor Standards Act also reveals that there was general recognition of the fact that under some conditions the regulation or prohibition of homework is essential to safeguard a minimum wage rate fixed by statute or administrative order. Section 351 of the New York Labor Code, which was first enacted in 1935, forbids industrial homework except in industries where conditions permit its continuance "without unduly jeopardizing the factory workers in such industries as to both wages and working conditions." The New Jersey Act of July 28, 1941 (Laws of 1941, c. 308), which added to earlier labor legislation, declared—

1. (a) \* \* \* that industrial homework runs counter to, and tends to defeat, the purpose of these laws because it is per-
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formed at excessively low wages for long and irregular hours, under insanitary and otherwise unhealthful working conditions, in constant competition with factory production and free from effective regulation; that these factors result in \* \* \* (2) the breakdown of standards of employment for factory workers in this State, (3) rendering more difficult the enforcement of laws governing the standards of employment for such factory workers. (4) unfair competition between employers in factory production and employers utilizing industrial homework \* \* \*.

Similar statutes designed very largely to protect minimum wage legislation by the restriction of homework were also in force in other industrial States. See Acts and Resolves of Massachusetts, 1937, c. 429; Laws of Pennsylvania, 1937, Act No. 176; New Jersey, Laws of 1941, c. 308; General Laws of Rhode Island, 1938, c. 293; cf. California Laws of 1939, c. 809.

The Rhode Island regulations during 1937 and 1938 furnished for Congress precise examples of the kinds of terms and conditions necessary to effectuate wage orders, and were therefore exact precedents for Section 8 (f) of the Fair Labor Standards Act. The Rhode Island minimum wage law enacted in 1936 (Pub. Laws, 1936, c. 2289) provided for the formulation of minimum wage orders under a procedure generally similar to that of the Fair Labor Standards Act. It made

no reference to homework or its prohibition. Section 9 provided, however, that the minimum wage orders—

shall include such proposed administrative regulations as the director may deem appropriate to implement the report of the wage board and to safeguard the minimum fair wage standards established.

Under that section, the director included in the wage order for jewelry manufacturing occupations, effective August 1, 1937, this provision:

Jewelry homework is hereby prohibited. No licenses or certificates will be issued for homework in this industry unless such work is provided for persons physically handicapped by age or disability in accordance with the provisions of Public Law, 1936, Chapter 2328.<sup>13</sup>

Underlying this order was a unanimous report of the Rhode Island wage board for the Jewelry Manufacturing Industry which stated:

The Wage Board recognizes that the distribution of industrial homework constitutes a major obstacle to the efficient administration of any minimum wage order, first because the enforcement of a minimum

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<sup>13</sup> Mandatory Minimum Wage Order No. 1, effective August 1, 1937, applying to Jewelry Manufacturing Occupations, Department of Labor, Division of Women and Children, R. I., Minimum Fair Wage Rates for Women and Minors Employed in This Occupation.

wage depends upon accurate hour records which in practice cannot be obtained from homeworkers, second, because homework may be of a character which is not done in the factory distributing such work, making it difficult to determine whether piece rates for such work will yield the minimum hourly rate [Transcript of Hearing before the Rhode Island director, p. 88].

Acting under the same power to safeguard minimum wage rates, the director also included a prohibition against homework in the wage order for wearing apparel and allied occupations, effective April 25, 1938.<sup>14</sup>

These laws and administrative orders were in force in 1938 when the Fair Labor Standards Act was being considered by the Congress. They had been adopted by important industrial States. Surely, therefore, Section 8 (f) must be read with this industrial and legislative background in mind. It is not to be assumed that Congress was ignorant of it, or acted without regard to its teachings. The only reasonable conclusion is that Congress intended, by the unqualified language of

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<sup>14</sup> Mandatory Minimum Wage Order No. 2, effective April 25, 1938, applying to Wearing Apparel and Allied Occupations, Department of Labor, Division of Women and Children, R. I., Minimum Fair Wage Rates for Women and Minors Employed in These Occupations.

Section 8 (f), to grant to the Administrator the authority to include in his wage orders, when necessary, any of the measures which experience under the National Recovery Act and state laws, as well as in industry, had already shown might be essential to prevent evasion and safeguard the minimum wage rates. One measure had been to prohibit the employment of industrial workers to labor in their homes. Even in the absence of affirmative evidence in the legislative history, therefore, it would be a fair inference that Congress intended to authorize the adoption of that measure here.

It is unnecessary, however, to rely on inference exclusively. The legislative history of the Act does show that Congress realized that provisions regulating or prohibiting homework are among the terms and conditions authorized by Section 8 (f). Such provisions were expressly mentioned in various prints of the bill itself as illustrations of the kind of terms and conditions that Section 8 (f) authorized, and the final omission of the illustrations occurred under such circumstances as to make it clear that the change was merely an improvement in draftsmanship without a change in sense.

The basic principle of the original Black-Connery bill was that minimum wage rates, wage

differentials and maximum hour limitations should be established by a Labor Standards Board through the issuance of labor standard orders. The bill, when it passed the Senate, provided that the administrative wage orders—

shall contain such terms and conditions (including the restriction or prohibition of industrial home work or of such other acts or practices) as the Board finds necessary or appropriate to carry out the purposes of such order[s], to prevent the circumvention or evasion thereof and to safeguard the fair labor standards therein established.

The illustrative parenthetical phrase without the reference to homework—*i. e.*, “(including the restriction or prohibition of such acts or practices)” —had been inserted in committee (S. Rep. No. 884, 75th Cong., 1st sess., p. 8).<sup>15</sup> The express

<sup>15</sup> Nothing occurred at the Joint Hearings before the Senate Committee on Education and Labor and the House Committee on Labor which throws light on the meaning of Section 8 (f). Most of the testimony relating to the subject of industrial homework was offered in support of a provision that would authorize the proposed Labor Standards Board to deal with homework as a threat to safety, health and child welfare, independently of its relation to minimum wage rates. See pp. 63-66, *infra*. The Secretary of Labor, however, testified that: “Another method of evading the provisions of wage and hour legislation is by the use of industrial homework. I, therefore, think we should have an amendment here which would give the Board, upon an appropriate finding of fact, the power to prohibit entirely

reference to industrial homework was ~~inserted~~ on the floor without comment or opposition (81 Cong. Rec. 7891). Obviously, the Senate regarded provisions restricting or prohibiting industrial homework as among the terms and conditions which the Administrator might find it necessary to include in a wage order in order to safeguard the minimum wage. And doubtless the Senate would not have accepted the amendment so readily if it had not realized that the power was already granted by the more general words.

The House Committee on Labor approved this provision in the form in which it passed the Senate. It was included in the first bill reported and considered on the floor of the House.<sup>16</sup> Even after the bill was recommitted to the Committee on Labor the same language was retained through many revisions.<sup>17</sup> Finally, in the Confidential

the use of industrial homework \* \* \*." (Joint Hearings, p. 184.) At a subsequent point in her testimony (p. 190), the Secretary made it plain that she was not expressing an expert opinion on whether the language already in the bill was adequate. Consequently, the failure of the Senate Committee to adopt the express provision that the Secretary suggested is probably due to its having concluded that Section 9 (6) of the bill reported contained power to deal not only with industrial homework but also with all other evasive acts and practices, making express mention of homework unnecessary.

<sup>16</sup> Section 9 (6), House Committee Print of August 5, 1937; Section 9 (6), as reported August 6, 1937, with H. Rep. No. 1452, 75th Cong., 1st sess.

<sup>17</sup> See, e. g., Section 9 (6), House Confidential Committee Prints of December 7, 1937, December 14, 1937, and December 17, 1937.

Subcommittee Print "A" of February 18, 1938, a change was made which added still further examples of "such terms and conditions"; as modified the provision read:

(3) shall contain such terms and conditions (including the restriction or prohibition of industrial home work or such other acts or practices and such requirements as the keeping of records, labeling, periodic reporting and posting of orders and schedules) as are deemed necessary to carry out the purpose of such order and prevent the circumvention or evasion thereof, or to safeguard the standards therein established.

Shortly before passage, the entire scheme of the House bill was changed. The Senate bill and the first bills reported by the House Committee on Labor had proposed the creation of a Board having the power to issue administrative orders establishing minimum wage standards. The House Committee on Labor abandoned that plan after several defeats in the House, and reported a bill which would fix specific statutory minima and contained no provision for administrative orders. S. 2475 as reported by Committee on Labor, H. Rep. No. 2182, 75th Cong., 3d sess. Consequently, this bill also omitted the provision made in the Senate bill for including in the administrative orders the terms and conditions necessary to their enforcement.

While this draft of the bill was being debated in the House, Congressman Ramspeck offered a substitute which was framed on the theory of the Senate bill and the earlier House Committee proposals, and which, therefore, included the same provision for incidental terms and conditions that was in the Senate bill (83 Cong. Rec. 7373-7378). This is the amendment referred to on pages 7 and 14 of the petition for certiorari. The entire substitute was rejected by the Committee and by the House. The clause dealing with homework was a small and comparatively unimportant provision in the substitute bill. It was never separately considered. The defeat of the substitute is not the slightest evidence that the House determined to withhold from the Administrator the power to prohibit homework even if the prohibition should be a necessary incident to the establishment of a decent minimum wage.

The House approved the bill reported by its Committee on Labor, and, in Conference, a compromise was worked out between the Senate plan for administrative regulation of wages and the House proposal for fixed statutory minima. The Conference bill proposed the fixed statutory standards which are set forth in Section 6 of the Act, but supplemented them with the administrative procedure, now found in Section 8, for raising the minimum rate up to 40 cents an hour by the issuance of administrative wage orders.

The Conference bill included *in haec verba* the provisions which are now Section 8 (f).

Neither the Conference Report (H. Rep. No. 2738, 75th Cong., 3d sess.) nor the ensuing debate, reveals the reason for omitting from Section 8 (f) the parenthetical illustrations that the Senate had approved unanimously and the House Committee on Labor had accepted repeatedly as appropriate in any bill making provision for wage orders. Petitioners' argument that the deletion shows a desire to limit the power of the Administrator proves too much. In the House, the parenthesis spoke at various times of "industrial home work," "other acts or practices," "the keeping of records, labeling, periodic reporting" and the "posting of orders and schedules." It seems quite plain that the omission of these illustrations does not deprive the Administrator of the power to include in his wage orders provisions dealing with evasive "acts or practices," "record keeping," or "reporting," or "labeling," or "posting of orders and wage schedules."<sup>18</sup> In

<sup>18</sup> The discussion on pages 13-15 and 24-25 of petitioners' brief concerning the provisions in the various drafts of the bill for labeling and posting is somewhat misleading. What happened was as follows:

As we have said, the bill which passed the Senate contained in Section 9 (6) a general grant of authority to include in labor standard orders "such terms and conditions (including the restriction or prohibition of industrial home-work or of such other acts or practices) as the Board finds necessary to carry out the purposes of such order \* \* \*". In addition, Section 14 contained special provisions author-

the Senate bill the parenthesis spoke of the "prohibition of industrial home work or of such other acts or practices" as the Administrator found necessary to prevent evasion of his wage orders. Surely it will be conceded that by deleting the parenthesis the Conference Committee

izing the Administrator to require (a) the posting of labor standard orders, (b) posting of a schedule of hours of employment in operation at an establishment and (c) the labeling of goods with all the information deemed by the Board necessary or appropriate to aid in the enforcement of any provision of the act or any order thereunder. The House Committee on Labor in its first report proposed amendments striking out the provision for labeling but it stated specifically that the bill provided for the posting of orders. H. Rep. No. 1452, 75th Cong., 1st sess., p. 18. On the floor, Congressman Ramspeck proposed to strike out the provision requiring the posting of schedules of hours of employment and the amendment was accepted (82 Cong. Rec. 1821). Congressman Ramspeck did not suggest, however, that the provision, in Section 14 (a), for the posting of administrative orders, which would include any wage schedules in the orders, should be deleted from the bill, and this provision was retained. Thereafter, the bill was recommitted to the Committee on Labor (82 Cong. Rec. 1835).

*Subsequently*, in considering various confidential prints of the bill, the Subcommittee of the House Committee on Labor inserted the parenthetical illustrations relating to labeling and the posting of orders and schedules. See p. 45, *supra*. As stated above, these provisions were retained by the Committee until the whole theory of the House bill was changed. Moreover, despite petitioners' criticism (Br. 15, n. 11), our memorandum in response to the petition for certiorari was entirely accurate in stating that all the parenthetical illustrations—both those in the Senate bill and those considered by the House Committee on Labor—were omitted from Section 8 (f) by the Conference Committee without comment.

This legislative history shows only that the House was opposed to requiring that schedules of hours of employment

did not signify its intention that the Administrator should be powerless to restrict or prohibit any evasive "acts or practices." Yet all the illustrations were deleted without comment and there is no basis for assuming that the Conference Committee intended the deletion of some to work a substantive change and the deletion of others to have no significance.

The true explanation of the omission must be that the draftsmen sought to clarify Section 8 (f) by omitting illustrations which had become so cumbersome that there was danger that they might cloud the essentially simple purpose of the section. All draftsmen are familiar with the maxim *expressio unius exclusio alterius*, and there was danger that the express mention of some specific terms and conditions authorized by the section would lead to the conclusion that others, or a different kind, were outside the delegated power. It is true, of course, as petitioners point out, that today the *Phelps Dodge* case and *Federal Land Bank v. Bismarck Co.*, 314 U. S. 95, 100, would probably be a sufficient answer to any such contention; those decisions show that the word "including" introduces only an illustrative application of a general principle. But in 1938, those cases had

be posted, a power which, so far as we are aware, no one has ever suggested that the Administrator can exercise. The Administrator has exercised the power to require the posting of wage orders in every order which has been issued under the statute.

not been decided and the reality of the danger which the draftsman sought to avoid is demonstrated by the force with which the argument was made in the *Phelps Dodge* case (see 313 U. S. 177, 188-189, 211) and by the decision of the lower court in *Federal Land Bank v. Bismarck Co.*<sup>10</sup> The significant point in this legislative history, therefore, is not the deletion of the parenthetical illustrations. The significant point is that the use of the illustrations in the earlier drafts clearly demonstrates that Congress knew that industrial homework was one kind of evasive act or practice that the language of Section 8 (f) was broad enough to cover; and, by adopting that language, Congress showed that it desired that power to deal with homework be included in the authority granted.

Nothing contrary to this conclusion appears in the subsequent history of the Act. Petitioners point out (Br. 17) that in 1939, the Administrator requested a series of amendments, one of which would have given him authority to make "such regulations and orders as are necessary or appropriate to carry out the provisions of this Act \* \* \* including the restriction of homework to the extent necessary to safeguard the minimum standards provided in the statute." H. R. 5435, 76th Cong., 1st sess., Sec. 4. The House Committee on Labor stated in its report (H. Rep. No. 522, 76th Cong., 1st sess., p. 8) that

<sup>10</sup> 70 N. D. 607.

As the act is now written, it is extremely doubtful whether the wage-and-hour standards which it establishes can be enforced as to industrial homeworkers.

Petitioners conclude from this evidence that the failure of the bill to pass indicates that, in 1938, the Congress which enacted Section 8 (f) did not intend the Administrator to prohibit homework even though the prohibition might be necessary to prevent evasion of the rates established by his wage orders.

But the proposed amendment, read with the committee report, seems to refer to the Administrator's power to promulgate safeguarding regulations protecting not the rates fixed by his wage order, with which we are here concerned, but the rates fixed by Section 6 itself (See *infra*, pp. 53-59, 67-78). It is idle to speculate, however, as to whether the Administrator sought, by this amendment, to remove doubts as to his authority to deal with homework in a wage order, or to make sure that he had the power to safeguard the minimum wage rates established not by wage order but by the statute.<sup>20</sup> The Administrator's desire

<sup>20</sup> Likewise, no inferences can be drawn from the model minimum wage and hour bill and publications of the Division of Labor Standards, United States Department of Labor, quoted by petitioners at pages 17-18 of their brief. Both were drawn up after the Fair Labor Standards Act became law. Indeed, if this kind of inquiry were permissible, it would be more than offset by the evidence, brought out by counsel for the petitioners at the hearings before the Ad-

for clarification and assurance is understandable; this case itself and the diversity of views in the court below stand as *ex post facto* justification for his caution. And the failure of Congress, in 1939, to pass the Norton bill (H. R. 5435, *supra*), which included a wide variety of provisions, is no evidence whatever that Congress, in 1938, withheld the power here claimed under Section 8 (f). Indeed, the only Congressional debate on H. R. 5435 indicates that it was opposed by a majority of the House, which refused to order a second, because of the belief that it would "take away some of the exemptions that so-called farm people enjoy under the act." 84 Cong. Rec. 6620-6622. Congressional rejection of the Norton bill is even less relevant in determining the meaning of Section 8 (f) than is the enactment of a subsequent statute which provides specifically for that which could only be inferred before. Cf. *United States v. Lowden*, 308 U. S. 225, 239; *Higgins v. Smith*, 308 U. S. 473, 479-480.

C. *The other provisions of the Act cast no doubt on our interpretation of Section 8 (f).*

Petitioners place great reliance upon the incongruities which they say that our interpretation of the Act creates. They point to the Administrator on the present wage order, which showed that officials of the Department of Labor were assured at the time of the passage of the original act that Section 8 (f) granted authority to prohibit homework in a proper case. See Transcript of Hearings before the Administrator, pp. 186-191. (A copy of this transcript is lodged with the Clerk of this Court.)

tion of Section 8 (f) would create. Thus, they lay great stress on the absence of any provision in the Act which would enable the Administrator to prohibit homework in order to prevent evasion of the statutory minimum wage rates in the absence of an applicable wage order (Br. 22-25). Petitioners emphasize the contrast by arguing that the power of the Administrator to issue wage orders will terminate for all practical purposes only eleven months hence, on October 23, 1945, when, they contend, they will be free to resume the practice of distributing industrial homework. One complete answer, which we discuss below at greater length, is suggested by the opinion of Judge Learned Hand (R. 219-221): Section 8 should be read as granting power to prevent evasion of the wage rates after as well as before October 23, 1945.

A second answer is given in Judge Frank's opinion (R. 200-202). Lack of power to prohibit homework in order to protect the statutory wage rates would not prove that there is no power so to protect the rates fixed by wage order. Under Section 8 (f) all evasive acts and practices stand on the same footing, and the absence from Section 6 of any analogue expressly authorizing the Administrator to regulate practices evasive of the statutory rates surely does not show that Congress intended Section 8 (f) to be wholly nugatory. The undoubted power, granted by Section

8 (f), to prohibit evasive acts and practices and to require that wage orders be posted cannot be denied because Section 6 grants no like authority to the Administrator to prevent circumvention and evasion of its minimum wage rates. The Act was a compromise between conflicting proposals. It would not be surprising, therefore, to find that a power given to the Administrator in connection with his authority to issue administrative wage orders was not conferred in those parts of the bill which were drawn from the House proposal to fix rigid statutory rates without administrative action. "Legislation introducing a new system is at best empirical, and not infrequently administration reveals gaps or inadequacies of one sort or another that may call for amendatory legislation. But it is no warrant for extending a statute that experience may disclose that it should have been made more comprehensive." See *Addison v. Holly Hill Fruit Products, Inc.*, No. 217, last Term, decided June 15, 1944, slip sheet, p. 8. Neither is the existence of a possible defect or the absence of perfect symmetry sufficient reason for narrowing a statute by restricting a power that the words have plainly granted.

Judge Learned Hand expressed the opinion that this reading of the statute ascribed to Congress absurdity of purpose because the consequences of the prohibition of homework would be felt long after the industry would be free to

resume it. But his opinion on this point, we believe, exaggerates the injury to the industry, in disregard of the Administrator's findings, and minimizes the good to be achieved by the prohibition of homework for even a short period. (See pp. 10-18 *supra*). No such disastrous consequences have been suffered in other industries in which homework has been prohibited by wage order.<sup>21</sup> Furthermore, Section 8 (f) should not be read as if it had been enacted to cover only the period for which this wage order will be effective. In 1938, when the Act became effective, wage orders had seven years to run. Orders covering other industries, which contain prohibitions of homework, have been in force for several years.<sup>22</sup> Surely it is not to ascribe an unreasonable intent to Congress to conclude that it conferred authority upon the Administrator to prohibit homework and to take other similar action in order to prevent evasion of wage orders for a seven year period, even though it may not have dealt with the danger of evasion in the more distant future. And the propriety of a particular exercise of the power towards the end of the seven year period is a matter of policy for the Administrator to decide.

On this point, moreover, it is also important to note that the inconsistency, if any, between the

<sup>21</sup> See *supra*, note 3.

<sup>22</sup> See *supra*, note 3.

powers of the Administrator under Section 8 (f), as we construe it, and his power after October 23, 1945, to prevent evasion of the statutory wage rates, is not as great as petitioners imply. Even if Judge Learned Hand's interpretation of Section 8 is rejected, the Administrator will not be altogether helpless in dealing with industrial homework and other evasive acts and practices leading to violations of the minimum wage. Section 11 authorizes him to "investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this Act, and \* \* \* [to] investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of this Act" [italics supplied]. Section 15 of the Act declares it unlawful to fail to pay the minimum wage rates specified in Section 6, and Section 17 grants the Administrator power to invoke the aid of the district courts "to restrain violations of section 15." This provision must be read to afford "a full opportunity for equity courts to treat enforcement proceedings \* \* \* in accordance with their traditional practices, as conditioned by the necessities of the public interest which Congress has sought to protect" (*Hecht Co. v. Bowles*, 321 U. S. 321, 330). Consequently, upon finding, in an investigation pur-

suant to Section 11, that an employer's practice of distributing homework is leading to violations of the statutory minimum wage rates, and that to halt the violations the distribution of homework must be terminated, the Administrator can prove these facts and secure in the district court a decree enjoining not only the wage violations but also the distribution of the homework. Cf. *Warner & Co. v. Lilly & Co.*, 265 U. S. 526, 532; *Ethyl Gasoline Corp. v. United States*, 309 U. S. 436, 461.

There is no novelty in this suggestion. The statutory right to an injunction restraining violations of a public law normally includes the right to other equitable relief necessary to make the injunction effective. The Sherman Act, for example, in terms invests the courts merely "with jurisdiction to prevent and restrain violations of this Act" (26 Stat. 209, 15 U. S. C. 4). Under this provision, however, the courts have traditionally exercised a wide variety of equity powers, including the power to restrain acts otherwise lawful where necessary to prevent continued violations of the statute. *Standard Oil Co. v. United States*, 221 U. S. 1, 77-82; *United States v. American Tobacco Co.*, 221 U. S. 106, 184-188; *Local 167 v. United States*, 291 U. S. 293; *Ethyl Gasoline Corp. v. United States*, 309 U. S. 436; *United States v. Univis Lens Co.*, 316 U. S. 241, 254. "The test is whether or not the required

action reasonably tends to dissipate the restraints and prevent evasions. Doubts are 'to be resolved in favor of the Government \* \* \*'" *United States v. Bausch & Lomb Optical Co.*, 321 U. S. 707, 726.

Similar remedies are available under Section 17 of the Fair Labor Standards Act. The courts are not to restrain only the actual violations of Section 15, *i. e.* of the minimum wage rates, and to leave employers free to follow the evasive practices which have brought about violations in the past and will make enforcement impracticable in the future. The Administrator's findings, which are unchallenged, show that homework is such a practice and that its continuance would make enforcement of the minimum wage rate impossible. Upon proving these facts in a court of equity, the court would deal, therefore, not only with the actual violations but also with the root of the evil. The principles followed under the Sherman Act must be equally controlling under Section 17.

Undoubtedly, this method of preventing violation of the statutory minimum wage rates in the employment of homeworkers would be cumbersome and expensive, for presumably the Administrator would have to proceed against each employer individually and prove the need for the prohibition in each individual case. If Judge Learned Hand's view be rejected, there is an undeniable difference between the Administrator's power to protect the statutory wage rates in a

court of equity and his power under Section 8 (f), as we construe it, to prevent evasion of rates fixed by a wage order. But the existence of even such an unsatisfactory remedy for dealing with homework as a source of evasion of the statutory rates shows that the inconsistency is no greater than might be expected in an act which, as the result of a practical legislative compromise, combines a seven-year period of administrative wage regulation with a future period of rigid statutory wage rates. Petitioners' interpretation (Br. 25) would read Section 8 (f) out of the statute by reducing it to a duplication of Section 11. If any inconsistency exists, it is present not only with respect to the prohibition of homework but also with respect to all measures which Section 8 (f) on its face authorizes the Administrator to adopt in order to prevent evasion. Only two alternatives would be open. One is to recognize frankly that the practical legislative compromise did not result in perfect symmetry. The other is to satisfy the desire for symmetry by striking from the Act the provisions of Section 8 (f), expressly granting the Administrator the authority to make the wage order minima effective. Plainly, as Judge Frank concluded, the former course should be adopted.

Petitioners also argue (Br. 25-26) that the Act provides no method for enforcement of the prohibition of industrial homework and that, therefore, Congress cannot be supposed to have authorized the Administrator to include such a pro-

hibition in a wage order even though it may be as essential as the Administrator has found. The argument is as follows: Section 15, entitled "prohibited acts", does not declare a violation of the terms and conditions included in a wage order pursuant to Section 8 (f) to be unlawful but, with respect to wage orders, merely provides that it shall be unlawful to violate Section 6. The only relevant part of Section 6, sub-section (a) (4), provides that employers shall pay "not less than the rate \* \* \* prescribed in the applicable order of the Administrator issued under section 8." Therefore, petitioners say, only the wage rate and not the incidental prohibition against homework can be enforced. This shows, they say, that Congress cannot have intended the vain prohibition.

The short answer to this contention is that, like so much of petitioners' argument, it would delete Section 8 (f) from the statute and leave the Administrator powerless to include in his wage orders any provisions, other than record-keeping requirements (Section 11 (c)), necessary to prevent their evasion. What petitioners say with respect to the prohibition of homework may be said with equal force concerning any other term or condition which the Administrator finds necessary to prevent evasion of a wage order. If the Administrator cannot enforce the prohibition of homework, he cannot enforce terms or conditions providing for posting orders and notices, or any other measures directed against evasive acts and prac-

tices. This is not what Congress intended. Section 8 (f) cannot be read entirely out of the statute. When Congress explicitly required the Administrator to include in wage orders "such terms and conditions as the Administrator finds necessary to carry out the purpose of such orders, to prevent the circumvention or evasion thereof \* \* \*" (Section 8 (f)), it obviously intended to impose an obligation on employers to comply with all the terms of the orders. Consequently, even if no remedy for breach of the obligation were specifically prescribed by the Act, the courts would not hesitate to supply one. *Texas & New Orleans R. R. v. Brotherhood of Railway Clerks*, 281 U. S. 548.

It is clear, however, that such a remedy is provided by Section 17. Failure to pay the wage rate specified in an order issued under Section 8 is a violation of Sections 6 (a) (4) and 15. The terms and conditions included in the wage order, such as the provisions in the order before the Court requiring the posting of notices and prohibiting the distribution of industrial homework, are not independent measures; they are incidental provisions necessary to prevent nonpayment of the wage rate in violation of Section 15. Section 17 is a broad grant of "jurisdiction \* \* \* to restrain violations of section 15." The *remedy* which may be granted is not limited to a decree reciting that the defendant shall not violate Section 15. Equity, in order to prevent the violations, will

go farther and include in the decree such terms and conditions as are necessary to prevent circumvention or evasion and to safeguard the wage rates that Sections 6 (a) (4) and 15 establish. See pp. 55-58, *supra*, and authorities cited; compare *California Drive-In Restaurant Ass'n v. Clark*, 22 Cal. (2d) 287. Certainly, therefore, in view of the relationship between court and administrative agency,<sup>22</sup> we are warranted in reading the grant of "jurisdiction to restrain violations of Section 15" as broad enough to authorize the courts to enforce those incidental terms and conditions compliance with which the Administrator has found to be necessary if violations of Section 15 are to be effectively prevented.<sup>23</sup>

<sup>22</sup> See *United States v. Morgan*, 307 U. S. 183, 191, *et seq.*; *Hecht Co. v. Bowles*, 321 U. S. 321, 330-331; *Phelps Dodge Corp. v. Labor Board*, 313 U. S. 177, 197.

<sup>23</sup> While the point need not be decided, it would seem that the criminal sanctions provided by Section 16 (a) may be invoked in case any of the provisions of a wage order are violated. Although Section 6 provides only that an employer shall pay his employees "not less than the rate \* \* \* prescribed in the applicable order of the Administrator under section 8", the fair intendment of the Act viewed as a whole is that it shall be unlawful to violate any of the incidental provisions of a wage order. Such provisions are so much a part of a wage rate that it has been held that "the power to provide safeguards to insure the receipt of the minimum wage and to prevent evasion and subterfuge, is necessarily an implied power flowing from the power to fix a minimum wage delegated to the commission". *California Drive-In Restaurant Ass'n v. Clark*, 22 Cal. (2d) 287, 302. So here, Congress may well have regarded compliance with the incidental terms embodied in wage orders under Section 8 (f) as being

*D. The failure of Congress to provide for the regulation or prohibition of industrial home work as it did for child labor does not show that the Administrator lacks power to prohibit it when necessary to prevent the circumvention or evasion of a wage order.*

Petitioners argue that in view of the importance of homework and the attention directed to it at the Joint Hearings before the Senate Committee on Education and Labor and the House Committee on Labor, Congress, if it intended the Administrator to deal with the evil,

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in substance an essential part of any payment of the prescribed minimum wages. In that event, in addition to enforcing the prohibition in a court of equity under Section 17, the Government could invoke the criminal sanctions available under Section 16 (a) for nonpayment of the minimum wage rate.

There is support for this analysis in the legislative history of the Norton Bill which was introduced at the session following the enactment of the Fair Labor Standards Act (discussed on pp. 50-52, *supra*). One of the amendments proposed in that bill would have made it a violation of Section 15 to violate "any of the provisions of any regulation or order of the Administrator issued pursuant to the provisions of this Act." In reporting the bill, the Committee explained that the amendment was necessary in the event that the Administrator were given a general rule making power "so that the violation of appropriate regulations will be prohibited." It explained that there also was, in the proposed amendment,—

A prohibition against violations of the provisions of any wage order issued by the Administrator pursuant to section 8. *This latter prohibition clarifies the act as now written.* [Italics supplied.]

See H. Rep. No. 522, 76th Cong., 1st sess., p. 10.

would have enacted broad regulatory provisions as it did in dealing with child labor (Br. 12-13, 26-27); from this premise, petitioners conclude that the Administrator has no power to prohibit homework as a means of preventing evasion of the minimum wage rates. The argument, we submit, wholly misconceives the nature of the Administrator's action in the instant case and the extent of the power which we claim for him. Industrial homework may be regulated either as an independent subject or, when necessary, as a means of safeguarding minimum wage rates. Quite apart from enforcement of minimum wage laws, homework has been regulated by the States because, even when proper wages are paid, its distribution tends to create unsatisfactory conditions dangerous to health and to encourage harmful child labor. Such prohibitions, unlike that involved in this case, may be imposed whether or not their imposition totally disrupts an industry which can be carried on only by the utilization of homeworkers, and even if the compensation of employees in the industry is far above the prescribed minimum. Thus there are many state laws regulating or forbidding homework without regard to its effect upon minimum wages. See, e. g., Ill. Rev. Stat. (1941) Ch. 48, Secs. 251-260; Laws of Pennsylvania (1937), Act. No. 176, Secs. 1, 4; Vernon's Texas Statutes, Cum. Supp. (1939), Tit. 12, Ch. 11, Art. 782a, Secs. 2, 3. Compare Acts and Resolves of Massachusetts (1937), Ch. 429,

Sec. 144 (the text of which appears in note 11, *supra*). It was with this aspect of homework as an independent evil that most of the witnesses were concerned in their testimony at the Joint Hearings. See Joint Hearings on S. 2475 and H. R. 7200, 75th Cong., 1st sess., pp. 402, 408, 409, 432. If Congress had intended to authorize that kind of regulation, doubtless, as in the case of the child labor provisions (Section 12), it would have done so in express terms. Such a provision would, of course, be different in scope and in consequence from the Administrator's power under Section 8 (f) to prevent evasion of wage rates established by order. The Senate Committee on Education and Labor, however, restricted the bill to the establishment of minimum wages and maximum hours and the prohibition of industrial child labor, and omitted any provisions dealing with homework as an independent evil. (S. Rep. No. 884, 75th Cong., 1st sess., p. 4.) We do not contend that the Administrator has any power to regulate homework independently of the regulation of wages, and he has not sought to exercise it. The power of the Administrator was confined to the regulation of wages and hours and to taking steps necessary to enforce his regulations. He was given authority to regulate homework only as a means of preventing evasion of a wage order which would render the wage rate a nullity, just as he might deal with any other evasive act or practice.

These same considerations answer petitioners' argument that if Congress had intended to authorize the Administrator to take such serious action as to regulate or prohibit industrial homework, it would have required him to consult the industry committees and hold hearings as he does before fixing a wage rate. Since the terms and conditions inserted in a wage order pursuant to Section 8 (f) must relate to the enforcement of the wage rate, it was quite natural for Congress to leave the selection of those terms to the Administrator, who is the enforcing official. Moreover, there are so many provisions in the Act which delegate to the Administrator alone more authority than he has sought to exercise under Section 8 (f) that the failure of Congress to require consultation with an industry committee cannot be regarded as evidence that the authority granted by Section 8 (f) extends only to trivial matters. For example, as Judge Frank pointed out in the court below, the definitions and determinations which the Administrator might make under Sections 7 (c) and 13 without consultation or hearings have far more extensive consequences than the prohibition of industrial homework (R. 202).

In conclusion, we submit, therefore, that there is no force to the arguments by which petitioners seek to read into Section 8 (f) a limitation which is not present. "While one may not end with the words of a disputed statute, one certainly begins there." *Federal Trade Commission v. Bunte*

*Bros.*, 312 U. S. 349, 350. Section 8 (f) should be given the full scope of its words, which plainly authorize the Administrator to include in wage orders "such terms and conditions" as he finds "necessary to carry out the purposes of such orders, to prevent the circumvention or evasion thereof, and to safeguard the minimum wage rates established therein." The background of social and economic thought reflected in the N. R. A. and state legislation shows that when the Fair Labor Standards Act was before Congress it was generally realized that in some industries the prohibition of homework was "necessary" to the effectiveness of minimum wage regulation. Congress, when it built up a parenthetical list of some of the powers that the general words of Section 8 (f) have granted, mentioned as one illustration the power to prohibit industrial homework. It follows, we submit, that Section 8 (f) should be held to grant the power which the Administrator sought to exercise in the wage order under review.

## II

THE PROHIBITION AGAINST THE DISTRIBUTION OF INDUSTRIAL HOME WORK WILL REMAIN EFFECTIVE AFTER OCTOBER 23, 1945.

Section 8 (e) of the Fair Labor Standards Act provides—

No order issued under this section with respect to any industry prior to the expira-

tion of seven years from the effective date of section 6 shall remain in effect after such expiration, and no order shall be issued under this section with respect to any industry on or after such expiration, unless the industry committee by a preponderance of the evidence before it recommends, and the Administrator by a preponderance of the evidence adduced at the hearing finds, that the continued effectiveness or the issuance of the order; as the case may be, is necessary in order to prevent substantial curtailment of employment in the industry.

The power granted to the Administrator to insert "necessary" terms and conditions is limited by Section 8 (f) to "orders issued under this section." In view of these provisions, Judge Learned Hand raised the question in the circuit court of appeals as to whether the Administrator's power to prohibit homework in order to safeguard minimum wage rates would not expire altogether on October 23, 1945, seven years after the Act became effective.

We believe that it is unnecessary to decide this question in the present case. The extent of the Administrator's powers to prevent evasion of the wage rates after October 23, 1945, upon termination of the wage orders, throws little light on the extent of his powers under Section 8 (f) in issuing wage orders. As we have shown, under Section 8 (f) all evasive acts and practices stand

on the same footing; homework no different from the others. Consequently, the logic that would require the conclusion that Section 8 (f) grants no power to include a "necessary" term dealing with homework as a menace to a wage order rate because the power would expire after seven years, would also require the conclusion that the Administrator has no power to include any necessary terms and conditions whatsoever because the power to include them does not extend to protection of the statutory wage rates and would expire after the seven year period. Manifestly, this is unsound; Section 8 (f) cannot be stripped of all vitality and read out of the statute. The only reasonable conclusion is that however inadequate the Administrator's power may be thereafter, Section 8 (f) does grant him power during the first seven years to deal with any evasive acts or practices; and that this authority includes power to deal with industrial homework, a practice which if left unregulated would gut the wage order for the embroideries industry. See pp. 10-15, *supra*. Hence, whichever way the issue raised by Judge Learned Hand's opinion might be decided, the wage order in question should be upheld. This is sufficient reason for the Court to refrain from deciding the broader issue in the present case.

We believe it appropriate, however, since the question has been raised, for us to amplify the

considerations which led Judge Learned Hand to conclude that Section 8 (f) authorizes the Administrator to enforce measures preventing the frustration of minimum wage regulation not only before October 23, 1945, but also after that date. We submit that this conclusion is correct.

First, it is important to note that the Administrator was given substantially all the power necessary to adopt terms and conditions required to prevent circumvention of the minimum wage rates during the initial seven year period. The intention of Congress was that the effective minimum wage rates should be fixed by administrative proceedings industry by industry. Apparently, the 25 and 30 cent rates specified in Section 6 were not considered as substitutes for administrative action but primarily as a floor below which the industry committees could not go in fixing the rates for the industry. Thus, Section 8 (a) provides that "with a view to carrying out the policy of this Act by reaching, as rapidly as is economically feasible without substantially curtailing employment, the objective of a universal minimum wage of 40 cents an hour \* \* \* the Administrator *shall from time to time* convene the industry committee for each such industry, and the industry committee *shall from time to time* recommend the minimum wage rate or rates

of wages to be paid under section 6 \* \* \*."

[Italics supplied.] Likewise, the Chairman of the House Committee on Labor stated, in explaining the Conference Report (83 Cong. Rec. 9256):

Between the absolute floor of 30 cents an hour after the first year and the floor of 40 cents an hour after the seventh year, the conference agreement provides for a limited degree of flexibility. The industry committee for each industry is *required* to recommend to the Administrator, and the Administrator is *required* to prescribe by order, the highest minimum-wage rate for the industry which will not substantially curtail employment. And so it is very possible, as I have said before, that the 40-cent wage rate will be reached even during the first or second year in the case of some industries, during the third year in the case of still others, and so forth. [Italics supplied.]

See also 83 Cong. Rec. 9163-9164, 9177, 9255-9266.

In the initial seven year period, therefore, the power granted by Section 8 (f) would be ample to prevent evasion. For the most part the rates would be fixed by wage orders which would contain, pursuant to Section 8 (f), all the terms and conditions necessary to prevent their evasion. If administrative difficulties delayed covering all

industries with wage orders—as actually happened—the Administrator could deal, in an industry which required such treatment, with practices destructive of the statutory rates by calling together the industry committee for the affected industries and fixing a rate by wage order.

It is also plain that Congress must have realized that the Administrator, following the scheme of Section 8 of the Act, would by 1945 have covered all industries with wage orders and have promulgated in the orders the terms and conditions necessary to prevent evasion of the wage rates established. Such measures might include in addition to prohibitions of industrial homework and a requirement for the posting of notices, both of which are illustrated by the wage order in the present case, any of the countless other incidental terms and conditions which state officials have found necessary to make minimum wage regulations effective. Such measures include the regulation of tipping, waiting time, charges for uniforms, the restriction or prohibition of homework, and other similar provisions. They are so indispensable to minimum wage regulation that in *California Drive-In Restaurant Ass'n v. Clark*, 22 Cal. (2d) 287, 302, the Supreme Court of California held that the power delegated to the State Commission to fix a minimum wage necessarily carried with it the implied power to stipu-

late that tips might not be included as part of the employee's wages.

The Court is now asked by petitioners to interpret the Act so as to provide that all the necessary enforcement provisions built up by the Administrator in the promulgation of wage orders will become ineffective on October 23, 1945. Section 8 (e) read with strict literalness supports this interpretation for it provides that "no order issued under this section with respect to any industry prior to the expiration of seven years from the effective date of section 6 shall remain in effect after such expiration" unless the industry committee recommends and the Administrator finds on a preponderance of the evidence that the continued effectiveness of the order is necessary to prevent substantial curtailment of employment. We submit, however, that no such absurdity was intended by the Congress. Congress fully realized that in many instances the goal of the 40 cent minimum wage rate would be attained before the expiration of seven years. (See statement of the Chairman of the House Committee on Labor, quoted, *supra*, p. 71). In fact, that goal has now been attained, through the wage order program, for all industries. Consequently, the only effect of reading Section 8 (e) as providing that all wage orders and all their terms and conditions

shall become ineffective after seven years, would be to render null the terms and conditions necessary to prevent evasion of the wage rate, and to leave the Administrator powerless thereafter to prevent evasion except as he may obtain the assistance of a court of equity.<sup>25</sup>

Common sense shows that this cannot be the intention. Although Congress used the term "order" in Section 8 (e), it must have been thinking only of the rates fixed by a wage order and not of its incidental provisions. The purpose of Section 8 (e) was to guarantee that attainment of the goal of a universal minimum wage of 40 cents an hour would not be delayed for more than seven years unless it should be definitely established that the rate of 40 cents an hour would substantially curtail employment in an industry. There is no clearer demonstration of this than the explanation of Section 8 (e) made by the Chairman of the Senate Committee on Education and Labor in explaining the conference agreement on the Senate floor. He said (83 Cong. Rec. 9164)—

Having fixed a rudimentary floor for wages for all industry producing for interstate commerce, we decided to authorize separate and, when substantial curtailment of employment would not result, higher minimum rates (not exceeding 40 cents an hour) to be fixed industry by industry.

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<sup>25</sup> See *supra*, pp. 56-59.

*But again to guard against the forces of inertia we provided that all industries covered by the act must be brought up to a minimum of 40 cents not later than 7 years after the effective date of the act, unless it should be definitely established by a preponderance of the evidence that such a rate would substantially curtail employment in the industry. [Italics supplied.]*

The Chairman of the House Committee on Labor gave a similar explanation of the purpose of the bill (83 Cong. Rec. 9256); and Congressman Ramspeck, who was a member of the committee and also one of the House conferees, pointed out that the effect of Section 8 (e) would be as follows (83 Cong. Rec. 9266)—

In 7 years it is directed that all wages shall go to 40 cents, the only exception being that if an industry committee finds by a preponderance of the evidence that to do so would create substantial unemployment, then they do not have to put into effect the 40-cent rate for the particular industry.

We submit that Section 8 (e) should be limited to its purpose. The object was to guard against inertia, not to cut short measures indispensable to making minimum wage rates effective. The intention of Congress should be carried out by reading Section 8 (e) as applicable only to those provisions of wage orders which specify wage rates less than 40 cents an hour, and not to the incidental enforce-

ment provisions with which Section 8 (e) is in no substantial sense concerned.<sup>26</sup>

It is manifest that the arguments opposed to this conclusion rest entirely upon the letter of Section 8 (e). They take no account of the wholesale violations of the minimum wage laws which will follow upon termination of the prohibition against homework in this and other needle trades. They ignore the manifest absurdity of concluding that all the terms and conditions which the Administrator has included in wage orders are to become void on October 23, 1945, without possi-

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<sup>26</sup> In 1939, in reporting the Norton Bill, the House Committee on Labor referred to the "absence of an authority under the act to issue regulations," and urged that the Administrator be authorized "to make regulations necessary or appropriate to carry out any of the provisions of the act." H. Rep. No. 522, 76th Cong., 1st sess., pp. 7-8. The Committee was particularly concerned with the lack of authority to issue interpretative regulations, such as those promulgated by the Bureau of Internal Revenue, and with the potential civil liability of employers who followed interpretations of the Administrator which the courts later held erroneous. The Committee mentioned, as an illustration, the need for power to interpret such terms as "hours worked." This provision was far broader than any power which we contend the Administrator possesses. We urge not that the Administrator has a general rule-making power, such as the Committee was discussing, but that under Section 8 (f) he has the very narrow power to include, in wage orders, terms and conditions necessary to safeguard the wage rates established, and that these provisions continue in effect even after the wage rate goes by statute to 40 cents an hour. Consequently, the statement of the Committee is not inconsistent with our position.

bility of replacement, even though, in the absence of such terms and conditions, the 40 cent minimum wage rate will often be a nullity. The letter of Section 8 (e) cannot compel this consequence in the face of the plain intendment of the statute. "Literal interpretation of statutes at the expense of the reason of the law and producing absurd consequences or flagrant injustice has frequently been condemned." The courts "are not forced by the letter to do violence to the spirit and purpose of the statute" (*Sorrells v. United States*, 287 U. S. 435, 448). Where the literal reading of general words produces irrational consequences, it is a proper judicial function to avoid such results by reading into the language appropriate exceptions or by limiting the general words to those matters which were the actual subjects of the provisions in question. *United States v. Kirby*, 7 Wall. 482; *Holy Trinity Church v. United States*, 143 U. S. 457, 459-462; *Lau Ow Bew v. United States*, 144 U. S. 47, 59; *Sunshine Coal Co. v. Adkins*, 310 U. S. 381, 392.

*Armstrong Co. v. Nu-Enamel Corp.*, 305 U. S. 315, 326, 333, presented such a question in substantially the same form as it is raised by the present controversy. Section 1 (b) of the Trade-mark Act of 1920 permitted the registration of certain trademarks not previously registerable "except those specified in paragraphs (a) and (b) of section 5" of the Act of 1905. To have

read this provision literally would have rendered Section 1 (b) of the 1920 Act irrational. Consequently, this Court limited the reference to "paragraphs (a) and (b) of section 5" to those provisions of paragraphs (a) and (b) which were within the intendment of the statute. So here, the Court should interpret the general words, "No order issued under this section \* \* \*" to mean those parts of an order which set the wage rate, and not the terms and conditions with respect to which application of the termination provisions of Section 8 (e) would be glaringly absurd.

Such an interpretation does not go beyond a proper exercise of the judicial function and at the same time gives vitality to minimum wage regulation which, as shown by the Administrator's findings, would otherwise be an empty gesture having no meaning in industries in which it is needed the most.

#### CONCLUSION

After careful hearings the Administrator found that it would be impossible to establish a 40 cent minimum wage rate in the embroideries industry unless the distribution of industrial homework were curtailed and the work transferred to workshops or factories where the work could be supervised and payment of the minimum guaranteed. Under such circumstances, the prohibition was authorized by Section 8 (f) as a "term or con-

dition" which the Administrator found "necessary to carry out the purposes" of the wage order and "to prevent the circumvention or evasion thereof." The unqualified words of Section 8 (f) should not be read to deny a power which is so indispensable to carrying out the purpose of Congress. The legislative history shows that the power was granted, and the other provisions of the Act, fairly read, do not point to a contrary conclusion.

Therefore, the judgment of the circuit court of appeals should be affirmed.

Respectfully submitted,

✓ · CHARLES FAHY,  
*Solicitor General.*

✓ DOUGLAS B. MAGGS,  
*Solicitor,*

✓ ARCHIBALD COX, .  
*Associate Solicitor,*  
*United States Department of Labor.*

✓ LOUIS SHERMAN,  
Assistant Solicitor,

KENNETH MEIKLEJOHN,  
Principal Attorney,

United States Department of Labor.

NOVEMBER 1944.

[PUBLIC—No. 718—75TH CONGRESS]

[CHAPTER 676—3D SESSION]

[S. 2475]

AN ACT

To provide for the establishment of fair labor standards in employments in and affecting interstate commerce, and for other purposes

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That this Act may be cited as the "Fair Labor Standards Act of 1938",

#### FINDING AND DECLARATION OF POLICY

SEC. 2. (a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

(b) It is hereby declared to be the policy of this Act, through the exercise by Congress of its power to regulate commerce among the several States, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.

#### DEFINITIONS

SEC. 3. As used in this Act—

(a) "Person" means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons.

(b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof.

(c) "State" means any State of the United States or the District of Columbia or any Territory or possession of the United States.

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(e) "Employee" includes any individual employed by an employer.

(f) "Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying,

the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 15 (g) of the Agricultural Marketing Act, as amended), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

(g) "Employ" includes to suffer or permit to work.

(h) "Industry" means a trade, business, industry, or branch thereof, or group of industries, in which individuals are gainfully employed.

(i) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

(k) "Sale" or "sell" includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.

(l) "Oppressive child labor" means a condition of employment under which (1) any employee under the age of sixteen years is employed by an employer (other than a parent or a person standing in place of a parent employing his own child or a child in his custody under the age of sixteen years in an occupation other than manufacturing or mining) in any occupation, or (2) any employee between the ages of sixteen and eighteen years is employed by an employer in any occupation which the Chief of the Children's Bureau in the Department of Labor shall find and by order declare to be particularly hazardous for the employment of children between such ages or detrimental to their health or well-being; but oppressive child labor shall not be deemed to exist by virtue of the employment in any occupation of any person with respect to whom the employer shall have on file an unexpired certificate issued and held pursuant to regulations of the Chief of the Children's Bureau certifying that such person is above the oppressive child-labor age. The Chief of the Children's Bureau shall provide by regulation or by order that the employment of employees between the ages of fourteen and sixteen years in occupations other than manufacturing and mining shall not be deemed to constitute oppressive child labor if and to the extent that the Chief of the Children's Bureau determines that such employment is confined to periods which will not interfere with their schooling and to conditions which will not interfere with their health and well-being.

(m) "Wage" paid to any employee includes the reasonable cost, as determined by the Administrator, to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodg-

ing, or other facilities are customarily furnished by such employer to his employees.

#### ADMINISTRATOR

SEC. 4. (a) There is hereby created in the Department of Labor a Wage and Hour Division which shall be under the direction of an Administrator, to be known as the Administrator of the Wage and Hour Division (in this Act referred to as the "Administrator"). The Administrator shall be appointed by the President, by and with the advice and consent of the Senate, and shall receive compensation at the rate of \$10,000 a year.

(b) The Administrator may, subject to the civil-service laws, appoint such employees as he deems necessary to carry out his functions and duties under this Act and shall fix their compensation in accordance with the Classification Act of 1923, as amended. The Administrator may establish and utilize such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may appear for and represent the Administrator in any litigation, but all such litigation shall be subject to the direction and control of the Attorney General. In the appointment, selection, classification, and promotion of officers and employees of the Administrator, no political test or qualification shall be permitted or given consideration, but all such appointments and promotions shall be given and made on the basis of merit and efficiency.

(c) The principal office of the Administrator shall be in the District of Columbia, but he or his duly authorized representative may exercise any or all of his powers in any place.

(d) The Administrator shall submit annually in January a report to the Congress covering his activities for the preceding year and including such information, data, and recommendations for further legislation in connection with the matters covered by this Act as he may find advisable.

#### INDUSTRY COMMITTEES

SEC. 5. (a) The Administrator shall as soon as practicable appoint an industry committee for each industry engaged in commerce or in the production of goods for commerce.

(b) An industry committee shall be appointed by the Administrator without regard to any other provisions of law regarding the appointment and compensation of employees of the United States. It shall include a number of disinterested persons representing the public, one of whom the Administrator shall designate as chairman, a like number of persons representing employees in the industry, and a like number representing employers in the industry. In the appointment of the persons representing each group, the Administrator shall give due regard to the geographical regions in which the industry is carried on.

(c) Two-thirds of the members of an industry committee shall constitute a quorum, and the decision of the committee shall require a vote of not less than a majority of all its members. Members of an industry committee shall receive as compensation for their services a reasonable per diem, which the Administrator shall by rules and regulations prescribe, for each day actually spent in the work of the committee,

and shall in addition be reimbursed for their necessary traveling and other expenses. The Administrator shall furnish the committee with adequate legal, stenographic, clerical, and other assistance, and shall by rules and regulations prescribe the procedure to be followed by the committee.

(d) The Administrator shall submit to an industry committee from time to time such data as he may have available on the matters referred to it, and shall cause to be brought before it in connection with such matters any witnesses whom he deems material. An industry committee may summon other witnesses or call upon the Administrator to furnish additional information to aid it in its deliberations.

(e) No industry committee appointed under subsection (a) of this section shall have any power to recommend the minimum rate or rates of wages to be paid under section 6 to any employees in Puerto Rico or in the Virgin Islands. Notwithstanding any other provision of this Act, the Administrator may appoint a special industry committee to recommend the minimum rate or rates of wages to be paid under section 6 to all employees in Puerto Rico or the Virgin Islands, or in Puerto Rico and the Virgin Islands, engaged in commerce or in the production of goods for commerce, or the Administrator may appoint separate industry committees to recommend the minimum rate or rates of wages to be paid under section 6 to employees therein engaged in commerce or in the production of goods for commerce in particular industries. An industry committee appointed under this subsection shall be composed of residents of such island or islands where the employees with respect to whom such committee was appointed are employed and residents of the United States outside of Puerto Rico and the Virgin Islands. In determining the minimum rate or rates of wages to be paid, and in determining classifications, such industry committees and the Administrator shall be subject to the provisions of section 8 and no such committee shall recommend, nor shall the Administrator approve, a minimum wage rate which will give any industry in Puerto Rico or in the Virgin Islands a competitive advantage over any industry in the United States outside of Puerto Rico and the Virgin Islands.

No wage orders issued by the Administrator pursuant to the recommendations of an industry committee made prior to the enactment of this joint resolution pursuant to section 8 of the Fair Labor Standards Act of 1938 shall after such enactment be applicable with respect to any employees engaged in commerce or in the production of goods for commerce in Puerto Rico or the Virgin Islands.<sup>1</sup>

#### MINIMUM WAGES

SEC. 6. (a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

(1) during the first year from the effective date of this section, not less than 25 cents an hour,

(2) during the next six years from such date, not less than 30 cents an hour.

<sup>1</sup> Amendment provided by Act of June 26, 1940 (Public Res. No. 88, 76th Congress)

(3) after the expiration of seven years from such date, not less than 40 cents an hour, or the rate (not less than 30 cents an hour) prescribed in the applicable order of the Administrator issued under section 8, whichever is lower, and

(4) at any time after the effective date of this section, not less than the rate (not in excess of 40 cents an hour) prescribed in the applicable order of the Administrator issued under section 8,

(5) if such employee is a home worker in Puerto Rico or the Virgin Islands, not less than the minimum piece rate prescribed by regulation or order; or, if no such minimum piece rate is in effect, any piece rate adopted by such employer which shall yield, to the proportion or class of employees prescribed by regulation or order, not less than the applicable minimum hourly wage rate. Such minimum piece rates or employer piece rates shall be commensurate with, and shall be paid in lieu of, the minimum hourly wage rate applicable under the provisions of this section. The Administrator, or his authorized representative, shall have power to make such regulations or orders as are necessary or appropriate to carry out any of the provisions of this paragraph, including the power without limiting the generality of the foregoing, to define any operation or occupation which is performed by such home work employees in Puerto Rico or the Virgin Islands; to establish minimum piece rates for any operation or occupation so defined; to prescribe the method and procedure for ascertaining and promulgating minimum piece rates; to prescribe standards for employer piece rates, including the proportion or class of employees who shall receive not less than the minimum hourly wage rate; to define the term "home worker"; and to prescribe the conditions under which employers, agents, contractors, and subcontractors shall cause goods to be produced by home workers.<sup>1</sup>

(b) This section shall take effect upon the expiration of one hundred and twenty days from the date of enactment of this Act.

(c) The provisions of paragraphs (1), (2), and (3) of subsection (a) of this section shall be superseded in the case of any employee in Puerto Rico or the Virgin Islands engaged in commerce or in the production of goods for commerce only for so long as and insofar as such employee is covered by a wage order issued by the Administrator pursuant to the recommendations of a special industry committee appointed pursuant to section 5 (e).<sup>1</sup>

#### MAXIMUM HOURS

SEC. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

<sup>1</sup> Amendment provided by Act of June 26, 1940 (Public Res. No. 88, 76th Congress).

(3) for a workweek longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(b) No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of that specified in such subsection without paying the compensation for overtime employment prescribed therein if such employee is so employed—

(1) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that no employee shall be employed more than one thousand hours during any period of twenty-six consecutive weeks,

(2) on an annual basis in pursuance of an agreement with his employer, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that the employee shall not be employed more than two thousand hours during any period of fifty-two consecutive weeks, or

(3) for a period or periods of not more than fourteen workweeks in the aggregate in any calendar year in an industry found by the Administrator to be of a seasonal nature,

and if such employee receives compensation for employment in excess of 12 hours in any workday, or for employment in excess of 56 hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed.

(c) In the case of an employer engaged in the first processing of milk, whey, skimmed milk, or cream into dairy products; or in the ginning and compressing of cotton, or in the processing of cottonseed, or in the processing of sugar beets, sugar beet molasses, sugar cane, or maple sap, into sugar (but not refined sugar) or into syrup, the provisions of subsection (a) shall not apply to his employees in any place of employment where he is so engaged; and in the case of an employer engaged in the first processing of, or in canning or packing, perishable or seasonal fresh fruits or vegetables, or in the first processing, within the area of production (as defined by the Administrator), of any agricultural or horticultural commodity during seasonal operations, or in handling, slaughtering, or dressing poultry or livestock, the provisions of subsection (a), during a period or periods of not more than fourteen workweeks in the aggregate in any calendar year, shall not apply to his employees in any place of employment where he is so engaged.

(d) This section shall take effect upon the expiration of one hundred and twenty days from the date of enactment of this Act.

#### WAGE ORDERS

SEC. 8. (a) With a view to carrying out the policy of this Act in reaching, as rapidly as is economically feasible without substantially curtailing employment, the objective of a universal minimum wage of 40 cents an hour in each industry engaged in commerce or in the production of goods for commerce, the Administrator shall from

time to time convene the industry committee for each such industry, and the industry committee shall from time to time recommend the minimum rate or rates of wages to be paid under section 6 by employers engaged in commerce or in the production of goods for commerce in such industry or classifications therein.

(b) Upon the convening of an industry committee, the Administrator shall refer to it the question of the minimum wage rate or rates to be fixed for such industry. The industry committee shall investigate conditions in the industry and the committee, or any authorized subcommittee thereof, may hear such witnesses and receive such evidence as may be necessary or appropriate to enable the committee to perform its duties and functions under this Act. The committee shall recommend to the Administrator the highest minimum wage rates for the industry which it determines, having due regard to economic and competitive conditions, will not substantially curtail employment in the industry.

(c) The industry committee for any industry shall recommend such reasonable classifications within any industry as it determines to be necessary for the purpose of fixing for each classification within such industry the highest minimum wage rate (not in excess of 40 cents an hour) which (1) will not substantially curtail employment in such classification and (2) will not give a competitive advantage to any group in the industry, and shall recommend for each classification in the industry the highest minimum wage rate which the committee determines will not substantially curtail employment in such classification. In determining whether such classifications should be made in any industry, in making such classifications, and in determining the minimum wage rates for such classifications, no classification shall be made, and no minimum wage rate shall be fixed, solely on a regional basis, but the industry committee and the Administrator shall consider among other relevant factors the following:

(1) competitive conditions as affected by transportation, living, and production costs;

(2) the wages established for work of like or comparable character by collective labor agreements negotiated between employers and employees by representatives of their own choosing; and

(3) the wages paid for work of like or comparable character by employers who voluntarily maintain minimum-wage standards in the industry.

No classification shall be made under this section on the basis of age or sex.

(d) The industry committee shall file with the Administrator a report containing its recommendations with respect to the matters referred to it. Upon the filing of such report, the Administrator, after due notice to interested persons, and giving them an opportunity to be heard, shall by order approve and carry into effect the recommendations contained in such report, if he finds that the recommendations are made in accordance with law, are supported by the evidence adduced at the hearing, and, taking into consideration the same factors as are required to be considered by the industry committee, will carry out the purposes of this section; otherwise he shall disapprove such

recommendations. If the Administrator disapproves such recommendations, he shall again refer the matter to such committee, or to another industry committee for such industry (which he may appoint for such purpose), for further consideration and recommendations.

(e) No order issued under this section with respect to any industry prior to the expiration of seven years from the effective date of section 6 shall remain in effect after such expiration, and no order shall be issued under this section with respect to any industry on or after such expiration, unless the industry committee by a preponderance of the evidence before it recommends, and the Administrator by a preponderance of the evidence adduced at the hearing finds, that the continued effectiveness or the issuance of the order, as the case may be, is necessary in order to prevent substantial curtailment of employment in the industry.

(f) Orders issued under this section shall define the industries and classifications therein to which they are to apply, and shall contain such terms and conditions as the Administrator finds necessary to carry out the purposes of such orders, to prevent the circumvention or evasion thereof, and to safeguard the minimum wage rates established therein. No such order shall take effect until after due notice is given of the issuance thereof by publication in the Federal Register and by such other means as the Administrator deems reasonably calculated to give to interested persons general notice of such issuance.

(g) Due notice of any hearing provided for in this section shall be given by publication in the Federal Register and by such other means as the Administrator deems reasonably calculated to give general notice to interested persons.

#### ATTENDANCE OF WITNESSES

Sec. 9. For the purpose of any hearing or investigation provided for in this Act, the provisions of sections 9 and 10 (relating to the attendance of witnesses and the production of books, papers, and documents) of the Federal Trade Commission Act of September 18, 1914, as amended (U. S. C., 1934 edition, title 15, secs. 49 and 50), are hereby made applicable to the jurisdiction, powers, and duties of the Administrator, the Chief of the Children's Bureau, and the industry committees.

#### COURT REVIEW

Sec. 10. (a) Any person aggrieved by an order of the Administrator issued under section 8 may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Administrator be modified or set aside, whole or in part. A copy of such petition shall forthwith be served upon the Administrator, and thereupon the Administrator shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part, so far as it is applicable to the

petitioner. The review by the court shall be limited to questions of law, and findings of fact by the Administrator when supported by substantial evidence shall be conclusive. No objection to the order of the Administrator shall be considered by the court unless such objection shall have been urged before the Administrator or unless there were reasonable grounds for failure so to do. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence may materially affect the result of the proceeding and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence to be taken before the Administrator and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Administrator may modify his findings by reason of the additional evidence so taken, and shall file with the court such modified or new findings which if supported by substantial evidence shall be conclusive, and shall also file his recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(b) The commencement of proceedings under subsection (a) shall not, unless specifically ordered by the court, operate as a stay of the Administrator's order. The court shall not grant any stay of the order unless the person complaining of such order shall file in court an undertaking with a surety or sureties satisfactory to the court for the payment to the employees affected by the order, in the event such order is affirmed, of the amount by which the compensation such employees are entitled to receive under the order exceeds the compensation they actually receive while such stay is in effect.

#### INVESTIGATIONS, INSPECTIONS, AND RECORDS

SEC. 11. (a) The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this Act, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act. Except as provided in section 12 and in subsection (b) of this section, the Administrator shall utilize the bureaus and divisions of the Department of Labor for all the investigations and inspections necessary under this section. Except as provided in section 12, the Administrator shall bring all actions under section 17 to restrain violations of this Act.

(b) With the consent and cooperation of State agencies charged with the administration of State labor laws, the Administrator and the Chief of the Children's Bureau may, for the purpose of carrying out their respective functions and duties under this Act, utilize

the services of State and local agencies and their employees and, notwithstanding any other provision of law, may reimburse such State and local agencies and their employees for services rendered for such purposes.

(c) Every employer subject to any provision of this Act or of any order issued under this Act shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this Act or the regulations or orders thereunder.

#### CHILD LABOR PROVISIONS

SEC. 12. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, no producer, manufacturer, or dealer shall ship or deliver for shipment in commerce any goods produced in an establishment situated in the United States in or about which within thirty days prior to the removal of such goods therefrom any oppressive child labor has been employed: *Provided*, That a prosecution and conviction of a defendant for the shipment or delivery for shipment of any goods under the conditions herein prohibited shall be a bar to any further prosecution against the same defendant for shipments or deliveries for shipment of any such goods before the beginning of said prosecution.

(b) The Chief of the Children's Bureau in the Department of Labor, or any of his authorized representatives, shall make all investigations and inspections under section 11 (a) with respect to the employment of minors, and, subject to the direction and control of the Attorney General, shall bring all actions under section 17 to enjoin any act or practice which is unlawful by reason of the existence of oppressive child labor, and shall administer all other provisions of this Act relating to oppressive child labor.

#### EXEMPTIONS

SEC. 13. (a) The provisions of sections 6 and 7 shall not apply with respect to (1) any employee employed in a bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesman (as such terms are defined and delimited by regulations of the Administrator); or (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce; or (3) any employee employed as a seaman; or (4) any employee of a carrier by air subject to the provisions of title II of the Railway Labor Act; or (5) any employee employed in the catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life, including the going to and returning from work and including employment in the loading, unloading, or packing of such products for shipment or in propagating, processing, marketing, freezing, canning, curing, storing, or distributing the above products or

byproducts thereof; or (6) any employee employed in agriculture; or (7) any employee to the extent that such employee is exempted by regulations or orders of the Administrator issued under section 14; or (8) any employee employed in connection with the publication of any weekly or semiweekly newspaper with a circulation of less than three thousand the major part of which circulation is within the county where printed and published; or (9) any employee of a street, suburban, or interurban electric railway, or local trolley or motor bus carrier, not included in other exemptions contained in this section; or (10) to any individual employed within the area of production (as defined by the Administrator), engaged in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products; or (11) any switchboard operator employed in a public telephone exchange which has less than five hundred stations.<sup>1</sup>

(b) The provisions of section 7 shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935; or (2) any employee of an employer subject to the provisions of Part I of the Interstate Commerce Act.

(c) The provisions of section 12 relating to child labor shall not apply with respect to any employee employed in agriculture while not legally required to attend school, or to any child employed as an actor in motion pictures or theatrical productions.

#### LEARNERS, APPRENTICES, AND HANDICAPPED WORKERS

SEC. 14. The Administrator, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by regulations or by orders provide for (1) the employment of learners, of apprentices, and of messengers employed exclusively in delivering letters and messages, under special certificates issued pursuant to regulations of the Administrator, at such wages lower than the minimum wage applicable under section 6 and subject to such limitations as to time, number, proportion, and length of service as the Administrator shall prescribe, and (2) the employment of individuals whose earning capacity is impaired by age or physical or mental deficiency or injury, under special certificates issued by the Administrator, at such wages lower than the minimum wage applicable under section 6 and for such period as shall be fixed in such certificates.

#### PROHIBITED ACTS

SEC. 15. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, it shall be unlawful for any person—

(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any

<sup>1</sup> Amendment provided by Act of August 9, 1939 (Public No. 344, 76th Congress, 53 Stat. 1266).

goods in the production of which any employee was employed in violation of section 6 or section 7, or in violation of any regulation or order of the Administrator issued under section 14; except that no provision of this Act shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods not produced by such common carrier, and no provision of this Act shall excuse any common carrier from its obligation to accept any goods for transportation;

(2) to violate any of the provisions of section 6 or section 7, or any of the provisions of any regulation or order of the Administrator issued under section 14;

(3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.

(4) to violate any of the provisions of section 12;

(5) to violate any of the provisions of section 11 (c), or to make any statement, report, or record filed or kept pursuant to the provisions of such section or of any regulation or order thereunder, knowing such statement, report, or record to be false in a material respect.

(b) For the purposes of subsection (a) (1) proof that any employee was employed in any place of employment where goods shipped or sold in commerce were produced, within ninety days prior to the removal of the goods from such place of employment, shall be prima facie evidence that such employee was engaged in the production of such goods.

#### PENALTIES

Sec. 16. (a) Any person who willfully violates any of the provisions of section 15 shall upon conviction thereof be subject to a fine of not more than \$10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

(b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

## INJUNCTION PROCEEDINGS

SEC. 17. The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 20 (relating to notice to opposite party) of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914, as amended (U. S. C., 1934 edition, title 28, sec. 381), to restrain violations of section 15.

## RELATION TO OTHER LAWS

SEC. 18. No provision of this Act or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this Act or a maximum workweek lower than the maximum workweek established under this Act, and no provision of this Act relating to the employment of child labor shall justify noncompliance with any Federal or State law or municipal ordinance establishing a higher standard than the standard established under this Act. No provision of this Act shall justify any employer in reducing a wage paid by him which is in excess of the applicable minimum wage under this Act, or justify any employer in increasing hours of employment maintained by him which are shorter than the maximum hours applicable under this Act.

## SEPARABILITY OF PROVISIONS

SEC. 19. If any provision of this Act or the application of such provision to any person or circumstance is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby.

Approved, June 25, 1938.

[PUBLIC LAW 283—77TH CONGRESS]

[CHAPTER 461—1ST SESSION]

[S. 1713]

AN ACT

To amend Public Law Numbered 718, Seventy-fifth Congress, approved June 25, 1938.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That paragraph (2) of subsection (b) of section 7 of Public Law Numbered 718, Seventy-fifth Congress, approved June 25, 1938, is hereby amended to read as follows:

"(2) on an annual basis in pursuance of an agreement with his employer, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that the employee shall not be employed more than two thousand and eighty hours during any period of fifty-two consecutive weeks, or".

Approved, October 29, 1941.

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IN THE

# Supreme Court of the United States

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October Term, 1944.

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Nos. 368, 369, 370.

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GEMSCO, INC., *et al.*,

*Petitioners,*

v.

L. METCALFE WALLING, Administrator of the Wage and Hour  
Division, United States Department of Labor.

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MILDRED MARETZO, *et al.*,

*Petitioners,*

v.

L. METCALFE WALLING, Administrator of the Wage and Hour  
Division, United States Department of Labor.

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JOSEPHINE GUISEPPI, *et al.*,

*Petitioners,*

v.

L. METCALFE WALLING, Administrator of the Wage and Hour  
Division, United States Department of Labor.

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## BRIEF FOR INDUSTRIAL COMMISSIONER OF THE STATE OF NEW YORK, AMICUS CURIAE.

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✓ NATHANIEL L. GOLDSTEIN,

*Attorney General of the State  
of New York,*

*Attorney for Edward Corsi,  
Industrial Commissioner of the State  
of New York.*

ORRIN G. JUDD,

*Solicitor General,*

WENDELL P. BROWN,

*First Assistant Attorney General,*

ROY WIEDERSUM,

*Assistant Attorney General,*

*of Counsel.*



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Division, United States Department of Labor.

---

**BRIEF FOR INDUSTRIAL COMMISSIONER OF THE  
STATE OF NEW YORK, AMICUS CURIAE.**

The grant of certiorari in this case was limited to the question of the statutory authority of the administrator of the Wage and Hour Division under Sec. 8(f) of the Fair Labor Standards Act (29 U.S.C.A. § 208), to include terms and conditions prohibiting industrial home work in a minimum wage order issued under Section 8 of the Act,

in order to carry out the purposes of such order, "to prevent the circumvention or evasion thereof, and to safeguard the minimum wage rates established therein".

Although the question relates primarily to the construction of a Federal statute, the decision in this case is of real importance to the State of New York in the administration of its own laws relating to industrial home work and minimum wage standards (New York Labor Law, Articles 13, 19). If the Federal Administrator is without power to enforce restrictions on home work, it will be more difficult to avoid evasion of New York home work orders or loss of the businesses affected to states without such regulation.

### **The Necessity of Prohibiting Home Work.**

The Industrial Commissioner believes that, in industries where home workers have been employed, stringent restrictions on home work are one of the essential factors in raising the standards of wages and working conditions for full time factory workers.

The experience and policy of New York State is embodied in the statement of purpose of the New York statute (New York Labor Law, Sec. 350, subd. 1), as enacted by L. 1935, c. 182:

"Sec. 350. Legislative purpose and definitions. 1. The employment of women and minors in industry in the state of New York under conditions resulting in wages unreasonably low and conditions injurious to their health and general welfare is a matter of grave and vital public concern. Any conditions of employment especially fostering such working conditions are therefore destructive of purposes already accepted as sound public policy by the legislature of the state and should be brought into conformity with that policy. Uncontrolled continuance of home-work is such a condition; here wages are notoriously lower and working

conditions endanger the health of the worker; the protection of factory industries, which must operate in competition therewith and of the women and minors employed therein and of the public interest of the community at large in their health and well-being, require strict control and gradual elimination of industrial homework. In the considered judgment of the legislature this article is constitutional."

The reasons for restricting homework in New York have been the low wages and poor working conditions of homeworkers and the impossibility of adequate regulation of industrial homework except through a policy of drastic restriction with a view to gradual elimination.

The first statute regulating industrial homework was enacted in 1892 (L. 1892, c. 673, amended by L. 1893, c. 173, L. 1896, c. 991, and L. 1897, c. 415; New York Labor Law of 1897, Sec. 100). The original plan of the statute was simply to require the licensing of employers giving out industrial homework and provide for the inspection of the sanitary and other conditions in the homes where the work was done. This policy was continued through successive amendments (L. 1899, c. 191; L. 1904, c. 550; L. 1906, c. 129; Labor Law of 1909, Sec. 100; L. 1913, c. 260; L. 1921, c. 50; L. 1932, c. 240).

Experience through the years proved the difficulty of preventing abuses in home work through the system of regulation which preceded the 1935 statute. Low wages, whether computed on a weekly or hourly basis, child labor, improper working conditions and unfair competition with factory workers were among the abuses which existed. (See Special Bulletin 158, New York Department of Labor (Frances Perkins, Industrial Commissioner), issued Feb. 1929, entitled "Some Social and Economic Aspects of Homework").

A more recent discussion of the problem is found in Special Bulletin 199 of the New York State Department of

Labor, issued in 1938, entitled "Homework in the Artificial Flower and Feather Industry in New York State." This cites the statements of the Artificial Flower and Feather Branch of Local 142, affiliated with the International Ladies Garment Workers Union, concerning the effect of homeworkers in the garment trade:

"\* \* \* 'The unemployed shop workers watch hundreds of homeworkers call for and deliver work,' they stated; due to the competition of whole families, including children, who work at home at lower wages for longer hours, women in the flower industry do not earn a living wage; no wage standards (such as those of the union) can be maintained as long as homework and homework contracting continue; the homeworkers themselves are exploited in that they work long and unregulated hours for inadequate wages; strikes to better conditions are broken by the use of homeworkers." (p. 18.)

See also the following quotations from that booklet:

"The effect of the competition of homeworkers working for short periods, diverting work from the factory workers and increasing the irregularity of factory employment, is reflected in the low annual earnings of the women workers in the shops. \* \* \* (p. 40.)

"That the distribution of flower making to homeworkers and their overlong hours of work for a few weeks in the season aggravate the irregularity of employment of the women in the shops is evident. \* \* \* (p. 57.)

The conclusions and findings at page 72 of the bulletin confirm what has been said above.

Miss Kate Papert, Director of the Division of Women in Industry and Minimum Wage of the New York Department of Labor, testified at the Federal Labor Department's hearing on the proposed issuance of the regulation which is attacked in these proceedings. (S. M. 1476 ff., session of

Nov. 12, 1942). It appears from the material referred to in her testimony that the ~~embroideries~~ embroidery industry is concentrated around New York City (See also Wage and Hour Division, Research and Statistics Branch, Report on the Embroideries Industry [1940], p. 30), and that hourly earnings for the average homemaker in the industry in 1937 ranged from nine cents to seventeen cents.

Although conditions improved somewhat after the Federal Fair Labor Standards Act went into effect in 1938, it was found, in 1939, that almost three-quarters of the homeworkers were still paid less than thirty-two and one-half cents per hour, the Federal minimum for the textile industry at that time (U. S. Department of Labor, Childrens Bureau, Industrial Homework Conditions in the Candlewick Bedspread and Lace Industries (1941), p. 43).

The effects of homework are set forth also in a report of the Division of Women, Child Labor and Minimum Wage, of the ~~New~~ New York Department of Labor, issued in August 1944, entitled "Trends in Homework Industries in New York State, 1942-1944":

"Homework has always been synonymous with cheap labor. The Homework Law states, and previous studies have repeatedly shown, that earnings of homeworkers are 'notoriously lower' than wages of factory workers. The higher wage levels now prevailing for factory workers and the minimum hourly rates prescribed by the Wage and Hour Law have had some effect in raising the wages of homeworkers. However, the earnings reported by homeworkers show that there still are a considerable number being paid sub-standard wages." (p. 9).

. . . . .

"The employment of young children has always been one of the worst evils of the homework system. Because many homework operations require little skill or dexterity, the help of children can readily be enlisted. Under the Labor Law, no child under 16 may

do homework and no child between 16 and 18 is permitted to work at home without both employment and homework certificates. However, homework investigations have emphasized the impossibility of adequate inspection to enforce child labor, as well as other laws, in homes. Before the inspector can gain admittance to a home, there is plenty of time to conceal illegal employment of children. \* \* \* (p. 15).

See also Frieda S. Miller, *Industrial Homework in the United States* (1941), 43 *International Labour Review* 1, at pages 22, 27, 32, for a historical review of the nationwide problem.

The effect of industrial homework in reducing the earnings of factory workers is shown also in the findings of the New York Department of Labor concerning homework in the glove industry in New York State. A copy of these findings, taken from the report prepared by the Division of Women in Industry and Minimum Wage, published in May, 1941, is annexed as an appendix.

### **Industries Have Adjusted Themselves to the Prohibition of Home Work Without Serious Difficulty.**

The Industrial Commissioner, acting under Article 13 of the New York Labor Law, has issued four orders prohibiting or restricting industrial homework:

Order No. 1, prohibiting industrial homework in the men's and boys' outer clothing industry, issued April 25, 1936;

Order No. 2, prohibiting industrial homework in the men's and boys' neckwear industry, issued February 26, 1937;

Order No. 3, prohibiting industrial homework in the artificial flower and feather industry, issued October 20, 1939;

Order No. 4, restricting industrial homework in the glove industry, issued May 15, 1942.

Not only Miss Papert's testimony before the Federal Administrator in connection with the issuance of the order under attack in this case, but also a published report of the New York Labor Department show that these orders have worked out satisfactorily without causing undue hardship to either the employers or the homeworkers. As was stated in the report quoted above on "Trends in Homework Industries in New York State, 1942-1944":

"At one time the men's clothing industry ranked as the largest homework industry in the State, and in men's neckwear, homework was strongly entrenched in the hand operations of four-in-hand and bow ties. The NRA codes for both of these industries restricted homework, but with the nullification of the NRA in 1935, homework threatened to return. The promulgation of the Homework Orders effectively stopped this trend. Today, with only a small number of homeworkers, the industries are better off from the point of view of efficiency of production, the stability of the industries and the well-being of their workers.

"Prior to the Artificial Flower and Feather Order, the making of flowers had been long associated with sweatshop conditions, child labor, low wages and long hours of work in tenements. Today, the industry presents an entirely different picture. From 5,000 homeworkers before the Homework Order became effective, on June 1, 1944 there remained but 145 certificated homeworkers. The number of firms employing homeworkers decreased from 79 to 32.

"Moreover, this shift from homework to factory production has benefited the artificial flower industry and its workers. A study of the adjustment of the industry to the restriction of homework revealed an increase of 30 per cent in factory employment during the first year that the Order was in effect, an increase directly attributable to the Order. For most employers no difficulties were encountered in replacing homeworkers by factory workers. By reducing unfair competition, the Order helped to stabilize the industry.

The study also showed that former homeworkers had satisfactorily adjusted to the Order." (p. 18).

See also:

New York State Department of Labor, Division of Women in Industry and Minimum Wage, "An Industry Adjusts—a study of the adjustment of the artificial flower industry to Homework Order No. 3," issued in June 1941;

Report of Industrial Commissioner for 1939, N. Y. Leg. Doc. (1940) No. 21, p. 33;

Report of Industrial Commissioner for 1941, N. Y. Leg. Doc. (1942) No. 90, p. 54.

### Conclusion.

From all the foregoing we believe it clearly appears that prohibition or drastic restriction of industrial homework is one of the essential conditions to carrying out the purposes of a minimum wage order and preventing circumvention or evasion of the rates established therein.

Dated: November 27, 1944.

Respectfully submitted,

NATHANIEL L. GOLESTEIN,  
*Attorney General of the State  
of New York;*  
*Attorney for Edward Corsi,*  
*Industrial Commissioner of the*  
*State of New York.*

ORRIN G. JUDD,  
*Solicitor General,*

WENDELL P. BROWN,  
*First Assistant Attorney General,*

ROY WIEDERSUM,  
*Assistant Attorney General,*  
*of Counsel.*

## APPENDIX.

STATE OF NEW YORK

DEPARTMENT OF LABOR

**Homework in the Glove Industry in New York State.**

Prepared by Division of Women in Industry and  
Minimum Wage May 1941

(pp. 191-194) The findings of this investigation in the glove industry show that:

1. Homeworkers, who, in some cases, are assisted by other members of the family, work at home in competition with makers and other production workers in the factories. The number of homeworkers has been increasing in recent years. In some years, the number of homeworkers on leather gloves has exceeded the number of women factory workers. The number of homeworkers employed at finger closing on knit gloves exceeds the number of factory workers in this occupation.

2. Even during peak weeks in busy seasons, when homeworkers were provided with the most work, their earnings were below a subsistence level, and many families had to receive aid from public funds.

3. In the interest of the public welfare, and in order to protect the health of women and minors, New York State has long regulated the hours of such workers in factories, but the homework system offers an escape from hours regulation. Some homeworkers had to work extremely long hours, at night and seven days of the week during peak periods and at other times, while many factory workers had less than a full week's work.

4. The homework system intensifies the seasonal irregularity of employment among women factory workers. During the busy season, the employer is enabled to send out rush orders to homeworkers, thus greatly increasing his labor force at short notice, without adding to his overhead. As a result he is encouraged to operate on a short-time basis instead of attempting to stabilize employment of his factory force by planning production over longer periods.

5. Not only is the employment of factory workers adversely affected by the formidable competition of home-

workers, but the earnings and labor standards of both suffer as a consequence of the homework system. At the peak of the season, weekly wages of homeworkers were from one-half to three-quarters of the earnings of women factory workers in the different branches of the industry; many factory workers had less than a full week's work while some homeworkers worked extremely long hours. During peak weeks in a year of increased production, more factory workers had less than a full week's work than in the peak week of the year before. Thus, in a year of increased production, more of the increased employment went to homeworkers than to factory workers. Nevertheless, the annual earnings of homeworkers were about half the annual earnings of factory workers. It seems reasonable to conclude that it is largely because of the competition of homeworkers that the majority of the women factory workers were unable to earn wages sufficient for self-support, even during the busiest week of the season, and that the weekly earnings of women in this industry compared unfavorably with those in other factory industries, and that their annual wages compared unfavorably with those in some of the lowest wage industries found in the State.

6. New York is the leading state in the manufacture of gloves, accounting for well over half of the value of all types of dress gloves produced in the United States. New York is the only state in which homework on gloves is prevalent, the glove industry in other states operating almost exclusively without the use of homework. In recent years, the relative position of factory workers in this industry in New York State has become worse as compared with workers in other states where homework is negligible.

7. The wage and hours standards of the Federal Wage and Hour Law, which are applicable both to factory workers and to homeworkers in the glove industry, have had little appreciable effect on the competition which homeworkers offer to factory workers with respect to employment and labor standards. Even during the busiest week of the season, many skilled factory workers and homeworkers earned less than the legal minimum hourly rates established under the Federal Wage and Hour Law, and less than the rates fixed under the State Minimum Wage Law for workers in relatively unskilled occupations.

8. The economic advantages in lower overhead and lower labor costs, which are enjoyed by employers using homework, are gained at the expense of both homeworkers and factory workers. The employment of low-paid homeworkers to reduce capital investment in plant or machines, or to cut down overhead expenses, represents an unfair competitive advantage to the more progressive employers, in that it tends to undermine the stability of production and the wage and price standards of the industry.

It is therefore recommended that under the powers granted to her in Article 13, Section 351 of the Labor Law, the Industrial Commissioner prohibit homework in the glove industry, following the precedent established by orders now in effect prohibiting homework in the men's and boys' outer clothing industry, the men's neckwear industry, and the artificial flower and feather industry. When these three industries were operating under the homework system, the conditions found were similar to those prevailing in the glove industry today. They have successfully adjusted to the strict control and gradual elimination of homework.

Nos. 368, 369, 370

# In the Supreme Court of the United States

OCTOBER TERM, 1944

GEMSCO, INC., ET AL., PETITIONERS

v.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE  
AND HOUR DIVISION, UNITED STATES DEPARTMENT OF  
LABOR

MILDRED MARETZO, ET AL., PETITIONERS

v.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE  
AND HOUR DIVISION, UNITED STATES DEPARTMENT OF  
LABOR

JOSEPHINE GIUSEPPI, ET AL., PETITIONERS

v.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE  
AND HOUR DIVISION, UNITED STATES DEPARTMENT OF  
LABOR

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF ON BEHALF OF THE STATE OF RHODE ISLAND  
AND PROVIDENCE PLANTATIONS, AS AMICUS  
CURIAE

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ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE SECOND CIRCUIT

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BRIEF ON BEHALF OF THE STATE OF RHODE ISLAND  
AND PROVIDENCE PLANTATIONS, AS AMICUS  
CURIAE

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OPINIONS BELOW

The principal opinion below (R. 189-219) was written by Judge Frank. Judge Learned Hand delivered a

<sup>1</sup> Together with No. 369, Mildred Maretzo, et al., Petitioners, v. L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor and No. 370, Josephine Guiseppi, et al., Petitioners v. L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor.

concurring opinion (R. 219-221). Judge Swan delivered a dissenting opinion (R. 221-224). These opinions are reported in 144 F. (2d) 608.

#### JURISDICTION

The judgments of the circuit court of appeals were entered on July 27, 1944 (R. 224-226). The petition for a writ of certiorari was filed on August 18, 1944 and granted on October 16, 1944 (R. 232). The jurisdiction of this Court is based upon Section 240 (2) of the Judicial Code as amended by the Act of February 13, 1925, and Section 10 (a) of the Fair Labor Standards Act.

#### QUESTION PRESENTED

Whether the Fair Labor Standards Act authorizes the Administrator to include a term or condition prohibiting industrial homework in a minimum wage order upon finding, pursuant to Section 8 (f) of the Act, that the prohibition is necessary to carry out the purposes of such order, to prevent the circumvention or evasion thereof, and to safeguard the minimum wage rate established therein.

#### STATUTE INVOLVED

Section 6 of the Fair Labor Standards Act establishes basic minimum wages to be paid each employee engaged in interstate commerce or in the production of goods for interstate commerce. Prior to October 24, 1939, the minimum was 25 cents an hour; from then until October 24, 1945, it was and is 30 cents an hour; and thereafter (subject to a few exceptions) it will be 40 cents an hour.

Section 8 of the Act looks to the more rapid establishment of the 40 cent minimum by the issuance of wage

orders applicable to particular industries fixing "the highest minimum wage rates for the industry which \* \* \* will not substantially curtail employment in the industry" (Section 8 (b) ). Section 6 provides that any rate so fixed shall become the minimum wage to be paid to every employee covered by the Act and the order.

Section 8 also prescribes both the procedure to be followed in promulgating a wage order and the terms which the order may contain. The Administrator is to summon an industry committee consisting of equal numbers of public, employer, and employee representatives (Sections 5(a), 5(b), 5(c), 8(a) ). The Committee is to make an investigation and recommend "the highest minimum wage rate for the industry which it determines, having due regard to economic and competitive conditions, will not substantially curtail employment in the industry" (Section 8(b), 8(c) ). Upon receiving the report of the industry committee, the Administrator is to give interested persons notice and an opportunity to be heard, and thereafter he is to determine whether the recommendations are in accordance with law, supported by the evidence, and adapted to carry out the purposes of the Act. If the Administrator disapproves the report, he refers the matter back to the industry committee. If he approves the report, he "shall by order approve and carry into effect the recommendations" (Section 8(d) ).

Section 8 (f) requires the Administrator to include in such wage orders the terms necessary to make them effective. It provides:

Orders issued under this section shall define the industries and classifications therein to which they are to apply, and shall contain such terms and conditions as the Administrator finds necessary to carry out the purposes of such orders, to pre-

vent the circumvention or evasion thereof, and to safeguard the minimum wage rate established therein.

#### STATEMENT

The administrative proceedings leading to the promulgation of the Wage and Hour Division's Minimum Wage Order for the Embroideries Industry, the terms and conditions contained in such Order and the Administrator's findings on the effect of industrial homework in the Embroideries Industry, are summarized in the Brief for Respondent pp. 4-18.

#### ARGUMENT

I. THE HISTORY OF RHODE ISLAND LEGISLATION AND REGULATIONS DEALING WITH HOMEWORKERS PRIOR TO THE ENACTMENT OF THE FAIR LABOR STANDARDS ACT SHOWS THAT CONGRESS INTENDED TO AUTHORIZE BY SECTION 8 (f) ANY NECESSARY PROHIBITION AGAINST HOMEWORK.

In 1936 the General Assembly of the State of Rhode Island enacted a Minimum Wage Law. (Public Laws of Rhode Island 1936 Chapter 2289, now listed as General Laws of Rhode Island 1938 Chapter 289.) This chapter provides for the formulation of minimum wage orders to establish minimum fair wage rates for women and minors in any occupation through Wage Board procedure similar to that provided under the Fair Labor Standards Act. The provisions of the Rhode Island law with regard to the establishment, composition and functions of the Wage Board are as follows:

*SEC. 6. Wage investigation and appointment of wage boards.*

The director or the commissioner shall have the power, and it shall be the duty of the director on the petition of 50 or more residents

of the state, to cause an investigation to be made by the commissioner or any authorized representative of the commissioner, of the wages being paid to women or minors in any occupation to ascertain whether any substantial number of women or minors in such occupation are receiving oppressive and unreasonable wages as defined in Sec. 2. If, on the basis of information in the possession of the director or the commissioner, with or without a special investigation, the director is of the opinion that any substantial number of women or minors in any occupation or occupations are receiving oppressive and unreasonable wages as defined in Sec. 2, he shall appoint a wage board to report upon the establishment of minimum fair wage rates for such women or minors in such occupation or occupations.

**SEC. 7. *Composition and functions of wage board.***

a. A wage board shall be composed of not more than three representatives of the employers in any occupation or occupations, and equal number of representatives of the employees in such occupation or occupations and of not more than 3 disinterested persons representing the public, one of whom shall be designated as chairman. The director, after conferring with the commissioner, shall appoint the members of such wage board, the representatives of the employers and employees to be selected so far as practicable from nominations submitted by employers and employees in such occupation or occupations. Two-thirds of the members of such wage board shall constitute a quorum and the recommendations or reports of such wage board

shall require a vote of not less than a majority of all its members. Members of a wage board shall serve without pay, but may be reimbursed for all necessary traveling expenses. The director after conferring with the commissioner shall make and establish from time to time rules and regulations governing the election of a wage board and its mode of procedure not inconsistent with this chapter.

b. A wage board shall have power to administer oaths and to require by subpoena the attendance and testimony of witnesses, the production of all books, records, and other evidence relative to any matters under investigation. Such subpoena shall be signed and issued by a member of the wage board and shall be served and have the same effect as if issued out of the Superior Court. A wage board shall have power to cause depositions of witnesses residing within or without the state to be taken in the manner prescribed for like depositions in civil actions in the Superior Court.

c. The director or the commissioner shall present to a wage board promptly upon its organization, all the evidence and information in the possession of the director or commissioner relating to the wages of women and minor workers in the occupation or occupations for which the wage board was appointed, and all other information which the director or the commissioner deems relevant to the establishment of a minimum fair wage for such women and minors, and shall cause to be brought before the board any witnesses whom the direct-

or or the commissioner deems material. A wage board may summon other witnesses or call upon the director or the commissioner to furnish additional information to aid in its deliberations.

d. Within 60 days of its organization a wage board shall submit a report including its recommendation as to minimum fair wage standards, for the women or minors in the occupation or occupations the wage standards of which the wage board was appointed to investigate. If its report is not submitted within such time the director may constitute a new wage board.

e. A wage board may differentiate and classify employments in any occupation according to the nature of the service rendered and recommend appropriate minimum fair rates for different employments. A wage board may also recommend minimum fair wage rates varying with localities if in the judgment of the wage board conditions make such local differentiation proper and do not effect an unreasonable discrimination against any locality.

f. A wage board may recommend a suitable scale of rates for learners and apprentices in any occupation or occupations, which scale of learners' and apprentices' rates may be less than the regular minimum fair wage rates recommended for experienced women or minor workers in such occupation or occupations.

Sections 8 and 9 provide for the inclusion in a wage order of administrative regulations which are deemed appropriate and necessary by the Director of Labor.

SEC. 8. *Action following wage board report.* A report from a wage board shall be submitted to the director who shall within 10 days confer with the commissioner and accept or reject such report. If the report is rejected the director shall submit the matter to the same wage board or to a new wage board with a statement of the reasons for the resubmission. *If the report is accepted it shall be published together with such proposed administrative regulations as the director after conferring with the commissioner may deem appropriate to implement the report of the wage board and to safeguard the minimum fair wage standards to be established, and notice shall be given of a public hearing to be held by the director or the commissioner not sooner than 15 nor more than 30 days after such publication at which all persons in favor of or opposed to the recommendations contained in such report or in such proposed regulations may be heard. (italics supplied)*

SEC. 9. *Directory order—including administrative regulations.*

Within 10 days after such hearing the director shall confer with the commissioner and approve or disapprove the report of the wage board. If the report is disapproved the director shall resubmit the matter to the same wage board or to a new wage board. If the report is approved the director shall make a directory order which shall define minimum fair wage rates in the occupation or occupations as recommended in the report of the wage board *and which shall include such proposed administrative regulations as the director may*

*deem appropriate to implement the report of the wage board and to safeguard the minimum fair wage standards established.* Such administrative regulations may include, among other things, regulations defining and governing learners and apprentices, their rates, number, proportion or length of service, piece rates or their relations to time rates, overtime or part-time rates, bonuses or special pay for special or extra work, deductions for board, lodging, apparel or other items or services supplied by the employer, and other special conditions or circumstances; and in view of the diversities and complexities of different occupations and the dangers of evasion and nullification, the director may provide in such regulations without departing from the basic minimum rates recommended by the wage board such modifications or reductions of or ~~additions~~ to such rates in or for such special cases or classes of cases as those herein enumerated as the director may find appropriate to safeguard the basic minimum rates established. (italics supplied)

No specific reference is made in the Minimum Wage Law to homework or its prohibition. However, under Sections 8 and 9 the director included the following administrative regulation in the first wage order to be established under the Rhode Island Law, namely that governing the jewelry manufacturing occupation, effective August 1, 1937.

#### HOMework

Jewelry homework is hereby prohibited. No licenses or certificates will be issued for homework in

this industry unless such work is provided for persons physically handicapped by age or disability in accordance with the provisions of Public Laws of 1936 Chapter 2328\* (now listed as General Laws 1938 Chapter 293.)

In including this administrative regulation prohibiting industrial homework in the jewelry industry the director was acting on the advice contained in the unanimous report of the Wage Board which recommended the minimum wage rates for that industry. The Wage Board report contained this statement with respect to homework in the jewelry industry:

The Wage Board recognizes that the distribution of industrial homework constitutes a major obstacle to the efficient administration of any minimum wage order, first because the enforcement of a minimum wage depends upon accurate hour records which in practice cannot be obtained for homeworkers, second, because homework may be of a character which is not done in the factory distributing such work, making it difficult to determine whether piece rates for such work will yield the minimum hourly rate.\*\*

The Director of Labor of Rhode Island acting under the same power to implement and safeguard the minimum wage, also included a prohibition against in-

\*Mandatory Order No. 1 effective August 1, 1937, Jewelry Manufacturing Occupation, Department of Labor, Division of Women and Children.

\*\*The unanimous report of the Rhode Island wage board for the Jewelry Manufacturing Industry.

dustrial homework in the Minimum Wage Order governing Wearing Apparel and Allied Occupations issued in April 1938.\* The provision states:

#### ADMINISTRATIVE REGULATIONS

**HOMEWORK:** Homework in the aforementioned occupations is hereby prohibited except for persons physically handicapped by age or disability who hold certificates issued by the Department of Labor in accordance with the provisions of the General Laws 1938, Chapter 293.

The provisions of this wage order apply to Rhode Island manufacturers in the embroideries industry as well as those engaged in the manufacturing of knit outerwear, women's apparel, gloves and mittens, buttons and buckles and handkerchiefs now covered by individual Federal Wage Orders.

The Mandatory Order No. 2 governing minimum fair wage rates for women and minors employed in Wearing Apparel and Allied Occupations defines these occupations as follows:

#### WEARING APPAREL AND ALLIED OCCUPATIONS

The occupations referred to herein mean wearing apparel and accessories, of whatever material composed, commonly or commercially known as garments or garment accessories, intended or designed to be worn or carried on or about the person, and shall include parts of these articles and their re-

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\*Mandatory Order No. 2 effective April 25, 1938, Wearing Apparel and Allied Occupations, Department of Labor, Division of Women and Children of Rhode Island.

pair and alterations, and such occupations as are allied with these through like processes of manufacture. They shall specifically include such occupations in factories, shops, or parts thereof, as manufacture, repair, or alter cotton garments; rayon garments; silk garments; woolen garments; elastic and rubber garments; knit goods; men's coats and suits; raincoats; leather, rubber and fabric shoes; handkerchiefs; handbags; hats and hat linings; and such allied occupations as upholstering and curtain, rug, pillow and mattress manufacture.\*

OCCUPATIONS: The occupations referred to herein are all occupations which have any part in the making, processing or production, repair or alteration of wearing apparel and allied articles.\*

It is significant that at the time these prohibitory provisions were issued there already existed in Rhode Island a law regulating the distribution of Industrial Homework. The statement of purpose contained in this law declares:

The employment of women and minors in industry in the State of Rhode Island under conditions resulting in wages unreasonably low and conditions injurious to their health and general welfare is a matter of grave and vital public concern. Any conditions of employment especially fostering such working conditions are therefore destruc-

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\*Definitions: Mandatory Order No. 2 effective April 25, 1938, Wearing Apparel and Allied Occupations, Department of Labor, Division of Women and Children of Rhode Island.

tive of purposes already accepted as sound public policy by the general assembly and should be brought into conformity with that policy. Uncontrolled continuance of homework is such a condition; here wages are notoriously lower and working conditions endanger the health of the worker; the protection of factory industries, which must operate in competition therewith and of the women and minors employed therein and of the public interest of the community at large in their health and well being, require strict control and gradual elimination of industrial homework.\*

Under the provisions of this law industrial homework is regulated by employers' licenses and employees' certificates. However, where a minimum wage was to be established in an industry in which the practice of Industrial Homework prevailed the director of labor and the industry wage boards in jewelry manufacturing and apparel and allied trades considered this type of regulation to be insufficient and supplemented it in the wage orders with industry-wide prohibitions against the continuance of the practice.

## II. THE EXPERIENCE OF RHODE ISLAND DEMONSTRATES THAT IT IS NECESSARY TO PROHIBIT HOMEWORK IN ORDER TO SAFEGUARD MINIMUM WAGE AND OTHER FACTORY STANDARDS.

The prohibition of industrial homework in the jewelry manufacturing industry in Rhode Island under Mandatory Minimum Wage Order No. 1, in August 1938, had the support of the New England Manufacturing Jewelers' Association as well as the support of

\*Public Laws of Rhode Island 1936 Chapter 2328 (now listed as General Laws 1938 Chapter 293.)

the workers in the industry. The extraordinary degree of compliance with the wage established by this order was definite evidence of the success of this and other administrative provisions of the order.

A wage study made by the Division of Women and Children of the Rhode Island State Department of Labor prior to the establishment of the minimum wage revealed that 36.2% of all women engaged in the industry were receiving less than 30c per hour. The wage order establishing a 30c per hour minimum and prohibiting industrial homework became effective in August 1937. A resurvey of wage rates in the industry made that year following the establishment of the minimum wage revealed that all but .2% of the women employees were then receiving 30c per hour or more.

A similar degree of compliance resulted in the case of the wage order governing the wearing apparel and allied occupations. In this industry as in jewelry manufacturing, the homework prohibition and other administrative regulations were responsible for the immediate and effective enforcement of the wage order.

A survey made by the Division of Women and Children of the Rhode Island State Department of Labor prior to the establishment of the wage order in 1938 revealed that 37.8% of the women working in the industry in this state were receiving less than 30c per hour. A survey made by the Division of the same firms six months after the establishment of the wage order in 1939 revealed that all but .5% of the women workers in the industry in Rhode Island were receiving 30c per hour or more.

With homework under license and certificate in Rhode Island for the past nine years it has been possible through examination of employers' records and em-

ployees' reports and home interviews to check the type of work sent out and the approximate earnings of the workers. It is evident that the work is usually the slow, tedious processes on which the workers cannot make very much speed. When the same work is not done in the factory the piece rates are set rather arbitrarily, and when these operations are timed the workers are usually found to be earning less than the minimum hourly rate. There would appear to be one major object in sending work out of the factory: that of having the work done for less than the minimum wage. Accurate time records for homework in the sense of those available for factory production are a physical impossibility. The use of Wage-Hour homework books has improved the situation considerably, but even this year when Rhode Island was checking all certified homeworkers before issuing certificates there were numerous instances where such records were incomplete and in the majority of cases they are inaccurate.

The use of industrial homework to evade labor standards and to maintain low wage rates at a time such as the present when the labor market is tight has been particularly apparent in Rhode Island in cases where the work has been let out on contract by the original manufacturer and the contractor has distributed the work to homes. In Rhode Island in various industries there have been many cases where such contractors have given out work for as little as the worker would accept and no attempt has been made to meet the minimum hourly rate. Where homework is permitted in an industry it is necessary in these cases to prove that a worker on a specific job was unable to make the minimum and then to revise rates. Where homework is prohibited, however, the proof that the practice of homework exists is sufficient

to correct the situation. Such a prohibition is of immense practical value to any enforcement agency.

An administrative provision in a wage order to prohibit industrial homework in the industry, results in the workers in that industry actually receiving the wages guaranteed them by the wage order. Such a provision protects from wage cutting competition the decent, law-abiding manufacturer who invests in plant facilities, pays taxes, keeps accurate records and provides employment for a large number of workers under good working conditions.

By prohibiting industrial homework in an industry where a minimum wage is established we encourage the increase in such factory employment under high wage standards. By establishing a minimum wage in an industry and permitting industrial homework we put difficulties in the way of the employer who offers high standards and we encourage the wage cutting, fly-by-night contractor who lowers the wage and safety standards by distributing work to the homes.

The cost of administering and honestly enforcing a minimum wage order which sets a wage as high as 40c per hour and which permits the distribution of industrial homework would be prohibitive, if such enforcement were actually possible. It would require a great increase in field and office staffs for any agency which was responsible. Such an expenditure of money in order to give contractors an opportunity to eliminate the overhead expenses of providing factory space and light, heat, etc. for workers, and to send work to many homes to be processed, with the worker paying the overhead costs is poor administrative procedure and a waste of government money.

Each year the problem of enforcement will become greater and more costly because more and more manufacturers will find the competition too keen to continue to maintain factory output paying standard wages, high taxes and overhead, and more of them will find it profitable to resort to homework. There will be more homes spread over a larger area to inspect and check regularly and many more individual production records of homeworkers to be checked. There will be more wage collection and litigation and fewer workers receiving the legal wage or better.

### III. THE EXPERIENCE OF RHODE ISLAND SHOWS THAT INDUSTRIES CAN READILY ADJUST TO THE PROHIBITION OF HOMEWORK.

The jewelry manufacturing industry is centered in Rhode Island. Prior to the prohibition of industrial homework in the jewelry industry\* in Rhode Island, a large amount of jewelry work was processed in the homes of this state. Plier work, linking, soldering, glueing, stone setting, polishing and many other light jewelry operations lend themselves to homework. However, the piece rates paid for this work in the homes were so low, often averaging well under 10c per hour, that it was apparent to all concerned that a minimum hourly rate could not be maintained unless homework was discontinued.

Since August, 1937 all of this work has been taken into the factories, and there has been no difficulty in adjusting any operation to factory production. The prohibition against industrial homework in this industry has had the support of the New England Manufactur-

\*Mandatory Minimum Wage Order No. 1, effective August 1, 1937, Rhode Island.

ing Jewelers' Association from the establishment of the wage order. They have cooperated in adjusting all homework operations to factory production, and it has been very successful.

In the jewelry industry the Federal Wage Order as well as the State Minimum Wage Order contains a prohibition against homework. Therefore, there is no home work distributed in other states and all of the processes continue to be performed in the factories of this state.

In the apparel industry also the homework prohibition contained in the apparel wage order resulted in homework operations being taken into the factories with no serious problem of adjustment. Folding, pressing, trimming, and packing operations as well as sewing and embroidering were previously performed in the homes on various garments and accessories. All of these were taken into the shop upon the establishment of the State minimum wage order containing the homework prohibition.\*\*

Out of state competition in embroidery, however, has developed since that time and has resulted in that operation being sent to states where homework is permitted. Rhode Island manufacturers state that this is due to wage competition and not to the failure to adjust to factory operation.

Embroidery work does not differ materially from any other hand work such as sewing. One embroidery factory has been started in Rhode Island since the passage of the State Mandatory Minimum Wage Order No.

\*\*Mandatory Minimum Wage Order No. 2, Apparel and Allied Occupations, Rhode Island 1938.

2. \*prohibiting homework of this type. This factory operates with all embroidery performed in the shop work-room.

The only difficulty now experienced by this manufacturer is that of competing with out of state manufacturers who employ homeworkers at lower piece rates than those he finds necessary to return the minimum hourly rate to his factory workers. This difficulty would be eliminated through a federal prohibition of industrial homework in the embroidery industry.

IV. THE EXPERIENCE OF RHODE ISLAND SHOWS THAT RESTRICTION OF INDUSTRIAL HOMEWORK IN THE EMBROIDERIES INDUSTRY IS NECESSARY TO THE MAINTENANCE OF THE STATE'S MINIMUM WAGE ORDER APPLICABLE IN THIS INDUSTRY.

The destructive effect of establishing a federal minimum wage with overtime provisions and failing to eliminate the practice of industrial homework where this exists is forcefully illustrated in the case of a Rhode Island manufacturer now engaged in the production of gold embroidered emblems for officers' uniforms of the Navy and Maritime Commission. All of this work was formerly done abroad but since the war, American manufacturers have taken up this production for the first time.

These emblems are hand embroidered to exact, elaborate design and standard, and are formed of gold thread and gold bullion on Navy felt. Contracts for these are awarded by the Navy and the Maritime Commission on the basis of competitive bids. At the present

\*Mandatory Minimum Wage Order No. 2, Apparel and Allied Occupations, Rhode Island 1938.

time the demand for the insignia is great and the bids are all reasonably high.

The Homework prohibition in the Rhode Island minimum wage order governing apparel and allied occupations\* does not permit a Rhode Island manufacturer to employ homeworkers, and accordingly all of the embroidering is done in the factory. In addition to the embroidery work on these emblems the Rhode Island manufacturer in question also manufactures his own materials such as gold thread and gold bullion. This reduces his cost of materials as compared with manufacturers who buy the thread and bullion.

This manufacturer is experiencing difficulty in producing the military emblems in competition with out of state manufacturers located in New York and New Jersey who are distributing the work on a large scale to homeworkers. The majority of these homeworkers are refugees who have come to New York from Europe during the war.

Due to the great demand for military insignia at the present time he is able to continue to market his product at a sufficiently high price to make it profitable to produce these insignia in his factory, paying fair wage rates to the women embroiderers for the time worked by them.

However, his margin of profit is extremely low as compared with that of his competitors in other states where this work is distributed to the homes. As a result of this he anticipates that he will be unable to continue the operation of his shop after the war demands are satisfied. In a highly competitive peace time market his prices will be too high as compared with those of the

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\*R. I. Mandatory Minimum Wage Order No. 2.

manufacturers in other states who are permitted to send work to the homes. The homework piece rates average only 50% to 75% of the piece rates paid Rhode Island factory workers in order to return to those workers a minimum of 40c per hour for the hours worked.

This manufacturer has accurate records of hours worked for all employees since they check in and out of work at the factory, and the minimum wage must be paid to his workers for all time worked. Competitors distributing homework have no such records and it is impossible to obtain them.

On the basis of straight time for one item, the Navy star, embroidered on a pair of shoulder boards for an officer's uniform, this Rhode Island producer must pay 70c a pair as a piece rate to the worker embroidering them to meet the 40c per hour rate. The piece rate which is paid by his competitors to the homeworkers is 40c a pair for this same item.

The practice of industrial homework in the gold embroidery industry which is a new industry in this country since the war, will therefore result in the elimination of factory production of this product through illegal competition which will be practically impossible to check unless the practice is prohibited before it swallows the entire infant industry in the United States.

Out of state competition in the embroidery field on women's underwear and handkerchiefs where, again, homework is prohibited in Rhode Island but permitted elsewhere, has already resulted in eliminating all embroidery from Rhode Island factories producing these articles. The embroidery operations can no longer be profitably performed by Rhode Island manufacturers because homeworkers in other states will do this work at

piece rates which cannot legally be paid where accurate time records are kept for the workers.

Handkerchief and underwear manufacturers in Rhode Island now send their goods to embroidery contractors in other localities who in turn distribute the work on these operations to homeworkers. Rhode Island workers are no longer given an opportunity to work at these occupations because they must receive the minimum wage for all time worked.

In the embroidery work on handkerchiefs and underwear as well as in the case of military emblems the work lends itself to factory production. It has been done in factories in this state. Factory production standards, however, are too high where evasion of the wage rates established by wage order is permitted through the distribution of industrial homework.

#### CONCLUSION

It is respectfully submitted that the judgments of the Second Circuit Court of Appeals in Nos. 368, 369 and 370 should be affirmed.

Respectfully submitted,

STATE OF RHODE ISLAND and  
PROVIDENCE PLANTATIONS, AS  
AMICUS CURIAE.

*By John H. Nolan, Attorney General  
and John J. Cooney, Counsel to  
the Attorney General.*

# SUPREME COURT OF THE UNITED STATES.

Nos. 368-370.—OCTOBER TERM, 1944.

Gemsco, Inc., et al., Petitioners,  
368 vs.

L. Metcalfe Walling, Administrator of  
the Wage and Hour Division, United  
States Department of Labor.

Mildred Maretzo, et al., Petitioners,  
369 vs.

L. Metcalfe Walling, Administrator of  
the Wage and Hour Division, United  
States Department of Labor.

Josephine Guiseppi, et al., Petitioners,  
370 vs.

L. Metcalfe Walling, Administrator of  
the Wage and Hour Division, United  
States Department of Labor.

On Writs of Certiorari to  
the United States Circuit  
Court of Appeals for the  
Second Circuit.

[February 26, 1945.] \*

Mr. Justice RUTLEDGE delivered the opinion of the Court.

The issue to be decided in these cases is narrow. It is whether respondent, as Administrator, has authority under Section 8(f) of the Fair Labor Standards Act, 52 Stat. 1060, to prohibit industrial homework as a necessary means of making effective a minimum wage order for the embroideries industry. The question arises in proceedings brought to review the order pursuant to Section 10. The cases were consolidated for hearing in the Circuit Court of Appeals, which sustained the Administrator's action, one judge dissenting. *Guiseppi v. Walling*, 144 F. 2d 608. Because of the public importance of the question and its importance for purposes of administering the statute, certiorari was granted, 323 U. S. —, limited to the stated issue.<sup>1</sup>

One of the Act's primary objectives was "a universal minimum wage of 40 cents an hour in each industry engaged in commerce

<sup>1</sup> The petition sought review also on questions of due process and delegation of legislative power. Cf. note 10 *infra*.

or in the production of goods for commerce" and to reach this level as rapidly as was "economically feasible without substantially curtailing employment." Section 8(a). Accordingly, Section 6 established basic minimum statutory wages, to be stepped up from 25 cents an hour to 40 cents generally<sup>2</sup> during the seven years from the section's effective date, October 23, 1938. Limited flexibility was provided in accordance with the declared purpose to reach the 40 cent level earlier if "economically feasible." Cf. 83 Cong. Rec. 9256. Section 8 empowers the Administrator to convene industry committees which, after investigation, report to him their recommendations concerning minimum wages<sup>3</sup> and reasonable classifications. Section 8(a), (b), (c), (d). The Administrator is then required by order to approve and carry into effect the committee's recommendations, after notice to interested persons and opportunity to be heard, if he finds they "are made in accordance with law, are supported by the evidence . . . and . . . will carry out the purposes" of the section; otherwise he must disapprove them. Section 8(d).

The Act's scheme is therefore a combination of "statutory" minimum wages fixed by Section 6 and what may be termed "committee" wages,<sup>4</sup> fixed by order made pursuant to Section 8. The former prevail in the absence of special administrative action; the latter, when such action has been taken to prescribe for a specific industry a higher level than the generally prevailing statutory floor. The order in this case, entered on approval of the committee's recommendations, after notice and extensive hearings,<sup>5</sup> prescribed a minimum wage of 40 cents an hour, an in-

<sup>2</sup> Section 6(a)(3), cf. also Section 8(e) and text *infra* page 17, provides for issuance and continuance in effect of wage orders to some extent at least, after the seven year period: "Sec. 6 (a). Every employer shall pay to each of his employees . . . (3) after the expiration of seven years . . . not less than 40 cents an hour, or the rate (not less than 30 cents an hour) prescribed in the applicable order of the Administrator issued under section 8, whichever is lower. . . ."

<sup>3</sup> "The committee shall recommend to the Administrator the highest minimum wage rates for the industry which it determines, having due regard to economic and competitive conditions, will not substantially curtail employment in the industry." Section 8(b). Recommendations for classifications are covered by Section 8(c).

<sup>4</sup> Cf. the concurring opinion of L. Hand, C. J., 144 F. 2d 608, 623. The combination is the result of a compromise, reached in conference, of differences between the Senate and the House as to the structure of the bill. Cf. text *infra* at note 32.

<sup>5</sup> The Industry Committee (No. 45) was appointed June 6, 1942, and on June 30 following submitted its unanimous report and recommendations, for the 40 cent rate, to the Administrator. Published notice of public hearing was given September 16. The hearing extended over ten days of the following

crease of 2½ cents over the previously prevailing "committee" rate.<sup>6</sup> Petitioners have not contested this, the primary, term of the order.

In this statutory setting stands Section 8(f), the crucial provision which in material part is as follows:

*(f) Orders issued under this section shall define the industries and classifications therein to which they are to apply, and shall contain such terms and conditions as the Administrator finds necessary to carry out the purpose of such orders, to prevent the circumvention or evasion thereof, and to safeguard the minimum wage rates established therein. No such order shall take effect until after due notice is given . . . (Emphasis added)*

November. The Administrator broadened its scope to include the question "what, if any, prohibition, restriction, or regulation of home work in this industry is necessary to carry out the purpose of such order," etc.

Industry representatives, who appeared, were unanimous, with one exception, in supporting the committee's recommendation, but divided on restricting or prohibiting industrial homework. Labor representatives supported both proposals, as did representatives of federal and state agencies, including the Departments of Labor of the United States and of the States of New York and Rhode Island.

Extensive testimony was taken and many exhibits were received in evidence. In many of its aspects the Administrator found the evidence repetitions of that upon which previous findings were based approving the recommendations of an earlier industry committee (No. 15), which resulted in establishing the 37½ cent rate by order effective January 27, 1941. Oral argument was restricted to the question of homework, to which the greater part of the record of 1691 pages relates. The procedure was substantially that which had been followed, upon the same question, in the cases of six other industries. See the Administrator's Findings and Opinion on the minimum wage recommendation of Industry Committee No. 26 for, and industrial home work in, the Jewelry Manufacturing Industry, dated October 16, 1941, and in relation to the Knitted Outerwear Industry (March 30, 1942), Women's Apparel Industry (July 8, 1942), Gloves and Mittens Industry (August 22, 1942), Button and Buckle Manufacturing Industry (September 19, 1942), and Handkerchief Manufacturing Industry (January 22, 1943).

<sup>6</sup>The provision for the 40 cent rate became effective September 20, 1943. The order provided the prohibition of homework should become effective after November 15, 1943. But the date was postponed, successively, until July 26, 1944, when the Circuit Court of Appeals stayed enforcement until this Court should act on the petition for certiorari.

The Administrator found that "the estimated direct increase in the wage bill resulting from the establishment of a minimum wage rate of 40 cents an hour would be 1.2 per cent in the three main areas and 2.6 per cent in the other areas." These findings are related to others to the effect that "almost 90 percent of the embroidery establishments are located in the New York City (including northern New Jersey), Chicago, and Philadelphia metropolitan areas. . . ." The Administrator concluded that "the insignificant rise in operating costs which will result from the recommended minimum will not cause substantial curtailment of employment." Cf. Section 8(b), (d).

## I.

The narrow issue turns upon the scope properly to be given the emphasized portions of the section. Respondent says that this authorizes him to take whatever action he finds necessary to prevent circumvention or evasion of the order so that the wage rate it establishes may be safeguarded; and that in this case his findings, amply sustained by the evidence, show prohibition of industrial homework is necessary to accomplish this end. As applied in this case, he has construed "necessary" not as meaning "helpful," "consistent," or "convenient,"<sup>7</sup> but as connoting that the prohibition is absolutely essential to achieve those purposes. He says the wage rate cannot be maintained unless industrial homework is prohibited, with the comparatively minor exceptions the order allows.<sup>8</sup> His findings and indeed his express conclusions therefore necessarily determine that regulation, by measures short of prohibition, cannot accomplish the relevant purposes of the order and of the statute.<sup>9</sup>

Petitioners do not dispute the Administrator's findings of fact or that the evidence fully sustains them. Nor indeed do they

<sup>7</sup> Cf. *Armour & Co. v. Wantock et al.*, 323 U. S. — (No. 73, decided December 4, 1944).

<sup>8</sup> The exceptions relate to persons obtaining special homework certificates who are "unable to adjust to factory work because of" age, physical or mental disability or are unable to leave home because their presence is required to care for an invalid; and were engaged in industrial homework in the industry prior to November 2, 1942 (except that this requirement is not to be applied in cases of unusual hardship) or are engaged in such homework under the supervision of a state vocational rehabilitation agency or a sheltered workshop as defined in the Code of Federal Regulations.

<sup>9</sup> The Administrator's opinion reviews at length the conditions surrounding homework in the industry inevitably tending to produce violation of minimum wage requirements; and the efforts previously made under both state and federal legislation to overcome these tendencies by regulatory measures.

His conclusions, upon the evidence, were in general that both state and federal efforts at regulation had been ineffective; that violations were widespread, of great variety and in great part concealed; and that these were due to factors inherent in the conditions under which industrial homework is performed and impossible to correct by the regulatory measures applied.

The Administrator's review of efforts at regulation, by both state, cf. note 17 *infra*, and federal authorities prior to the Fair Labor Standards Act, led him to conclude "that labor conditions in industrial home work are not susceptible to regulation," and that, according to "the nearly unanimous viewpoint of Federal and State officials having experience in the administration of labor laws, . . . regulation, restriction or prohibition of industrial home work must be on a Nation-wide basis if minimum wage standards are to be preserved and upheld."

Likewise, "[e]xperience under the Fair Labor Standards Act of 1938 [to November, 1942] has also indicated that labor conditions in industrial homework in this industry are not susceptible to regulation that will guarantee that

question his conclusions in any respect except that he has no legal authority to make the prohibition.<sup>10</sup> The petition for certiorari conceded, as does also the brief, that the prohibition was included solely because respondent found "he could not [otherwise] enforce the minimum wage rate as to the home workers employed in the industry." The brief states further that petitioners, "during the entire course of the proceedings, . . . challenged only the statutory authority" of the respondent to include the prohibition.

In this sharply chiseled state of the issue, the accuracy of the Administrator's findings and conclusions and the sufficiency of the evidence to sustain them must be taken not only as true but as conceded, apart from the single question of authority to include the prohibition notwithstanding it is so buttressed in fact.<sup>11</sup> The posture of the case therefore compels acceptance of the Administrator's position that, without the prohibition, the wage rate cannot be maintained, and that circumvention and evasion cannot be prevented.

Furthermore, upon the findings that is true not only with reference to the employees who are themselves homeworkers. It is true also as to all other employees in the industry.<sup>12</sup> According

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the home worker will be paid the established minimum rate. . . . Compliance with the Act has been the exception rather than the rule." Cf. note 16 *infra*. Such homework, it is further concluded, "furnishes a ready means of circumventing or evading the minimum wage order for this industry" and "mere regulation . . . including regulation of the record-keeping practices of employers or governmental establishment of piece rates will not be adequate to secure enforcement of the minimum wage order for the Embroideries Industry."

<sup>10</sup> In the petition for the writ of certiorari the only questions presented were (1) whether the statute authorizes inclusion of the prohibition as a "term and condition" of the wage order; (2) whether, if so, this delegation of authority is confined by adequate standards; and (3) whether the Fifth Amendment forbids Congress to authorize the prohibition "solely because of the inability to enforce the minimum wage rate applicable to homeworkers, without regard to the social and economic character of such employment." Cf. note 1 and text *supra*.

<sup>11</sup> By Section 10; "The review by the court shall be limited to questions of law, and findings of fact by the Administrator when supported by substantial evidence shall be conclusive."

<sup>12</sup> The Administrator's report stated: "It was testified at the hearing that home work is cheaper in terms of labor costs than factory work and is used by employers to reduce production costs, despite the advantages derived from the direct supervision over production, standardization, and specialization which are possible in the factory. The evidence . . . conclusively shows that large proportions of home work employees . . . are paid less than the applicable minimum. It is apparent that if some employers are allowed to utilize home workers at subminimum wage scales, other employers compelled to pay a 40-cent minimum will be placed at a competitive disadvantage."

to the best available estimates, the number of homeworkers at peak employment (April 1, 1939, to July 15, 1942) ranged from 8,500 to 12,000, whereas the number of factory workers as of June, 1942, was 18,500. The number of wage earners per factory in 1939 employed in some 1,431 establishments averaged between 12 and 13 workers.<sup>13</sup> Not only therefore is it impossible for the Administrator, without the prohibition, to follow the statute's mandate [Section 8(d)] to "carry into effect" the recommendations of the committee as to 8,500 to 12,000 homeworkers, who generally are part-time pieceworkers.<sup>14</sup> He neither can do so as to factory workers, who generally are full-time workers.

Hence, if the prohibition cannot be made, the floor for the entire industry falls and the right of the homeworkers and the employers to be free from the prohibition destroys the right of the much larger number of factory workers to receive the minimum wage. This is true not merely as a matter of inference from evidence having only prospective and predictive value. It is proved conclusively by the Administrator's experience in attempting by regulatory methods to secure compliance with the pre-

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<sup>13</sup> The nature of homework, it was said, is such that estimates of the number of homeworkers in this industry are difficult, whereas by contrast employment figures for factory workers may be ascertained with ease and definiteness. The estimates stated are from data submitted by the Economics Branch, Wage and Hour Division, United States Department of Labor. The figures concerning the number of establishments and of factory workers were derived from the Census of Manufactures.

<sup>14</sup> According to the report of the Economics Branch, cf. note 13 *supra*, entitled *The Current Status of Home Work in the Embroideries Industry*, October, 1942, one of the most important factors affecting earnings of homeworkers is "the great multiplicity of designs and styles." Variations are constant and short lived. Piece rates must be determined and applied with every change. Few operations lend themselves to standardization, especially for homework. In one instance, during a period of six months, a "lace-cutting firm received work requiring the cutting of 300 different designs, each of which had a different piece rate." The report further states: "Piece rates for plant workers can readily be checked. . . . The setting of piece rates to yield the minimum wage for home workers is a much more complex problem than for plant workers."

The Administrator's opinion states the most common practice in setting piece rates for home operations is by the timing of a sample worker in the factory and the evidence showed this worker may be a very skilled and experienced one. Of the firms inspected by the Wage and Hour Division June 1, 1939, to July 1, 1942, "a review of 211 showed that 80, or 37.9 percent, fixed piece rates for home workers upon the basis of arbitrary estimates; 73, or 34.6 percent, based the rates for home workers on time tests of plant sample workers; and only 40, or 19 percent, based the rates for home workers on time tests of some of the home workers themselves." Cf. also note 16 *infra*.

viciously prevailing<sup>15</sup> lower "committee" rate.<sup>16</sup> His experience is borne out by that of state and federal authorities prior to the Fair Labor Standards Act.<sup>17</sup> Attempts to maintain minimum wages by regulating homework have failed generally of their purpose. This failure, after fair trial, is responsible for the Administrator's resort to prohibition in the present order.

<sup>15</sup> Cf. note 6 *supra*.

<sup>16</sup> Cf. note 9 *supra*. The Administrator's report stated: "The Economics Branch found that even during the boom period from January 27, 1941 to July 1942, 61.2 percent of the home workers in the Industry as a whole were paid less than 37½ cents an hour, in violation of the applicable minimum wage order. It was found that 52.6 percent of the home workers received less than 35 cents an hour; nearly 30 percent less than 25 cents; and 17.4 percent less than 20 cents. Fifteen home workers, or 1.8 percent of the total number, were paid as little as 10 cents an hour or less. The percentage receiving less than 37½ cents an hour was highest, 90.2 percent, in lace cutting and lowest, 23.3 percent, in crochet beading. Miscellaneous embroidery had 81.3 percent of the home workers receiving less than the wage order minimum, passementerie, 74.1 percent, hand embroidery, 72.6 percent, and Schiffli and Swiss hand-machine embroidery, 31.1 percent."

Much other evidence, including testimony of individual homeworkers and of the Director of the Women's Division, New York Department of Labor, relating to inspections made in 1941 and 1942 involving 1,582 homeworkers, sustained the Administrator's statement, "The evidence in the record, including the report of the Economics Branch, which showed low sub-minimum earnings for the bulk of the home workers in this Industry, was not seriously contested at the hearing," and his further conclusions that, in view of competitive relationships, mere regulation of homework would not be adequate to secure effective enforcement of the order and, likewise, that this could not be had by applying the prohibition to only part of the industry.

<sup>17</sup> He found specifically that the efforts of New York and New Jersey in prohibiting distributors who operate no shops from distributing homework and in restricting such contractors, though having a beneficial effect, had not "changed the economic structure of the Industry as presently carried on"; that hidden child labor is a widespread characteristic of the system, discoverable only after extensive investigation presenting an almost insurmountable problem for enforcement agencies, employers and homeworkers themselves; that violations of record keeping regulations by employers and workers are consistent and widespread; and that "[i]n view of the competitive relationship between different types of embroidery, any regulatory, restrictive, or prohibitory order affecting only certain operations would create a competitive disadvantage for the employers engaged in those operations."

Noting that twelve states had legislated, before 1900, to regulate tenement workshops, the Administrator found that "[e]ffective enforcement was impossible, however, and home work remained a serious problem." The subsequent period of legislation by a few states "achieved little effective control prior to 1930." New state laws, enacted during the 1930's, providing for abolition of homework by administrative order, "became the only effective statutory approach to a problem generally considered beyond regulation." Under the National Industrial Recovery Administration, 118 of the 556 codes included homework provisions; and 86 per cent of the 118 prohibited homework. Homework in consequence was greatly reduced, but its volume turned sharply upward when the National Industrial Recovery Act was declared unconstitutional in *Schechter Poultry Corp. v. United States*, 295 U. S. 495 (1935).

The case therefore comes down squarely to whether or not minimum wages may be effectively prescribed and required in this industry. If homework can be prohibited, this is possible. If it cannot, the floor provided by the order cannot be maintained and, further, what is more important, it inevitably follows that no floor, whether of "statutory" or of "committee" wages, can be maintained.<sup>18</sup>

In this light petitioners' position is, in effect, that the statute cannot be applied to this industry. Their argument is not put in these terms. It comes to that. So to state it is to answer it. The industry is covered by the Act. This is not disputed. The intent of Congress was to provide the authorized minimum wage for each employee so covered. Neither is this questioned. Yet it is said in substance that Congress at the same time intended to deprive the Administrator of the only means available to make its mandate effective. The construction sought would make the statute a dead letter for this industry.

The statute itself thus gives the answer. It does so in two ways, by necessity to avoid self-nullification and by its explicit terms. The necessity should be enough. But the Act's terms reinforce the necessity's teaching. Section 8(d) requires the Administrator to "carry into effect" the committee's approved recommendations. Section 8(f) commands him to include in the order "such terms and conditions" as he "finds necessary to carry out" its purposes. These duties are backed up by other provisions.<sup>19</sup> When command is so explicit and, moreover, is reinforced by necessity in order to make it operative, nothing short of express limitation or abuse of discretion in finding that the necessity exists should undermine the action taken to execute it. When neither such limitation nor such abuse exists, but the necessity is conceded to be well founded in fact, there would seem to be an end of the matter.

## II.

Petitioners' objections are not procedural. They have not contended that the provision of the order forbidding homework

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<sup>18</sup> No reason is apparent which would make any factor in the homework situation effective to nullify the 40-cent rate that would not apply also to the 37½-cent rate or any other minimum, however fixed, except one placed so low that even homeworkers would seek other kinds of employment or accept idleness in preference. The Administrator made no findings or conclusions concerning this self-evident matter.

<sup>19</sup> Cf. text at note 38ff *infra*.

is a definition or classification of the industry or, either for that reason or any other, must be submitted to the industry committee and made only upon its recommendation. Such a position would have nullified their argument that the statute confers no authority in any case to prohibit homework. The provision is neither a definition nor a classification of an industry. It relates merely to a mode or method of conducting the industry. The statute provides that the committee shall recommend minimum wage rates and reasonable classifications, and that the Administrator, if he disapproves "such recommendations," shall refer them either to the committee or to another committee. Section 8(a), (b), (c), (d). Nothing in the Act requires the Administrator to take the committee's recommendation concerning the terms and conditions found necessary to make their recommendation and the order based on it effective. He must find that the terms and conditions he imposes are necessary for this purpose. He did so in this case, after extended hearings, upon ample evidence and upon findings of necessity not questioned. To say that in such circumstances he can adopt no term or condition which materially alters the industry is only to say Congress did not mean what is said and that the industry cannot be made subject to the statute's regulation. It is also to ignore "the distinct separation of the functions to be performed by the committee under § 8(a), (b), (c), (d), from that to be performed by the Administrator after submission of the committee's report. . . ." *Opp Cotton Mills v. Administrator*, 312 U. S. 126, 147.

Petitioners' arguments rest chiefly on their views of the legislative history and the character of the prohibition. The latter, they say, is not a "method of enforcement" but is rather a form of "experimental social legislation" touching a matter not incidental to the order, but in the nature of a wholly independent subject beyond the purview of the statute and therefore of the Administrator's power.

This argument is closely interlaced with the contentions drawn from the legislative history and the statute's enforcement provisions, presently to be noted. In so far as it is independent of these, however, it rests on wholly untenable premises. One is that the prohibition is merely an "enforcement" measure. It is rather primarily preventive in character, intended to aid in making the order effective and to eliminate the need for enforcement.

But, in accordance with their "enforcement" conception, petitioners' larger fallacy is that the Administrator can take no action toward making his order effective which, if taken as a matter of independent legislation not expressly related to the Fair Labor Standards Act's objects, would produce substantially the same social and economic effects, apart from those objects. In this view the Administrator's power is so restricted that he can do nothing if, in addition to making the rate effective and safeguarding against circumvention, other social and economic consequences would result.

The answer is obvious. Section 8(f), in directing the Administrator to include "such terms and conditions" as he "finds necessary to carry out the purposes of such orders," did not forbid him to take the only measures which would be effective, merely because other consequences necessarily would follow. The language neither states expressly nor implies that he is to do only what will achieve the stated ends and nothing more. The statute does not direct the Administrator to make the rate effective by all necessary means except those which may have other social or economic consequences.

His power, it is true, is not one of social or economic reform except as that power relates to maintaining authorized minimum wages and the statutory hours of labor. But the Administrator has not exercised his authority for such an extraneous purpose. He expressly disclaimed any such object.<sup>20</sup> The entire record supports the disclaimer. The whole bearing of the evidence and the findings was toward the effects of homework upon the wage rate and its maintenance, not upon other evils it may generate. Petitioners' argument, not questioning the necessity for the prohibition or the finding that it exists, would accomplish indirectly what direct challenge which they do not attempt would achieve if successful. Absent the necessity, the Administrator's power would not go to this length. Present that necessity, to deny it

<sup>20</sup> His opinion expressly states: "This proceeding is not concerned with the question whether home work is desirable or undesirable from a social point of view or as a form of economic organization. It is concerned solely with whether the home work system in the Embroideries Industry furnishes a means of circumventing or evading a wage order, putting into effect the minimum wage recommendation of Industry Committee No. 45 so that it is necessary to provide in the wage order for its regulation, restriction or prohibition in order to carry out the purposes of such order and to safeguard the minimum wage rate established therein."

because .er effects necessarily but incidentally must follow his action, would be to nullify both his power and the statute. Nothing in the statute, whether of letter or of substance, warrants such a limitation. What is "incidental," what "independent" of stated statutory ends often presents a difficult issue. But that is seldom if ever true when to deny the authority or other feature questioned would nullify the Act by reading out of its purview the only means for making it effective.<sup>21</sup>

Homework in this case is not an independent industry. It is conducted largely by the same employers who maintain factory establishments or by "contractors" who are in competition with such employers. Homeworkers are an integral part of the single industry. Their labor competes with the labor of factory workers, within the same establishment, between establishments, and between regions where the industry is concentrated. The effects of their competition with factory workers are, as has been shown, to destroy the latters' right as well as their own to have, practically speaking, the benefit of the minimum wage guaranteed by the Act. They represent the smaller fraction of the industry, both in numbers and in working time. Such are the uncontested findings of fact.<sup>22</sup>

When all of these facts are taken into account, the case is clearly not an instance of effort to achieve ends beyond or independent of the statutory objects. It rather exhibits but an exercise of the necessary means to accomplish those objects. This is confirmed, further, by the evidence and the findings which show that the prohibition will not eliminate the great majority of homeworkers from the industry; but on the contrary will result only in transfer of the scene of their work from the home to the factory and will do this without undue hardship.<sup>23</sup> For the larger

<sup>21</sup> Cf. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U. S. 381, 392; *United States v. Powers*, 307 U. S. 214, 217; *Armstrong Paint & Varnish Works v. Nu-Enamel Corp.*, 305 U. S. 315, 333; *Bird v. United States*, 187 U. S. 118, 124.

<sup>22</sup> Cf. notes 12, 13 and text at notes 14 and 16 *supra*. Other relevant findings of the Administrator need not be quoted or noted specifically, reference being made to his opinion for them.

<sup>23</sup> The Administrator's opinion devotes some seventeen pages to review of the evidence in this aspect of the case, including previous experience with ability of both employers and homeworkers to adjust to the prohibition. This experience related to the effects of prohibitions under various state laws and the National Industrial Recovery Act. With reference to the latter, of 75 firms investigated by the Children's Bureau, Department of Labor, only one discontinued the line of goods on which homeworkers had been employed and of 3,135 homework employees prior to the prohibition, 2,588 or 82 per cent

number of workers unable to make the transfer, the exceptions allowed by the order will provide an adequate mode for permitting continuance of work at home.<sup>24</sup>

The argument from the legislative history undertakes, in effect, to contradict the terms of Section 8(f) by negative inferences drawn from inconclusive events occurring in the course of consideration of the various and widely differing bills which finally, by compromise and adjustment between the two Houses of Congress, emerged from the conference as the Act. The plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction. This is such a case.

Petitioners' most insistent emphasis is upon two things. One is that the committee in charge of the original Senate bill reported that it was limited to two objectives, the establishment of minimum wages and maximum hours and the prohibition of industrial child labor.<sup>25</sup> The other, that at various stages of consideration the Senate bill contained, in the section [9(6)] comparable to what is now Section 8(f), a parenthetical clause which expressly included homework among other specified practices the Administrator was authorized to restrict or prohibit,<sup>26</sup> and this clause was omitted from the final conference draft.

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were employed in factories after the prohibition. Similar results were shown in the experience with state laws in New Jersey, New York and Rhode Island.

Petitioners presented contrary evidence, largely statements of individual homeworkers in embroidery that they could not or would not make the transfer, for various reasons, if the prohibition were adopted. The Administrator found some of this evidence unacceptable "as furnishing a sound basis for predicated their actual conduct when faced with actual prohibition" and concluded that reasonable adjustment could be made to the prohibition both by employees and by the employers.

<sup>24</sup> Cf. note 8 *supra*. Because "relatively few home workers will be eligible to continue home work under this exception," the Administrator found that "no threat to the standards of the wage order" would be presented by making it.

<sup>25</sup> S. Rep. No. 884, 75th Cong., 1st Sess.; cf. 81 Cong. Rec. 7658, 7659.

<sup>26</sup> The clause assumed various forms in the course of consideration of the Senate bill. The section comparable to Section 8(f) was 9(6). The original parenthesis, apparently, was inserted in committee in the form, "(including the restriction or prohibition of such acts or practices)." S. Rep. No. 884, 75th Cong., 1st Sess., 8. This was amended on the floor, without debate or record vote, to read, "(including the restriction or prohibition of industrial home work or of such other acts or practices)," thus introducing the first specific reference to homework. 81 Cong. Rec. 7891. The bill passed the Senate with the clause in this form. 81 Cong. Rec. 7957.

The House Committee on Labor approved and reported the Senate bill with

The first objection merely repeats in another guise the argument that homework is an independent subject matter wholly without the statute's purview, but bolsters this with the assumption that because oppressive child labor was covered expressly, homework and all other factors affecting maintenance of minimum wages were left entirely untouched, if they produce other evils which independent legislation might reach, merely because they were not also specifically mentioned. The assumption ignores the fact that the child labor provisions are themselves independent prohibitions, not limited to operation in situations where child labor has harmful effects on maintaining the minimum wage rate but working entirely independently of such consequences.<sup>27</sup> Those provisions are therefore not merely means of putting into effect and maintaining the wages required by the Act, as is the Administrator's prohibition of homework. The former would apply regardless of any effect upon the wage structure. The latter can apply only when it is clear that such effects require this in order to maintain and safeguard that structure.

This difference is in fact the difference between end and means, made such by the terms of the statute itself. Congress by stating expressly its primary ends does not deny resort to the means necessary to achieve them. Mention of child labor therefore gives no ground to infer, from failure expressly to mention homework, that the latter was not included within the general language which comprehends all necessary means to achieve the Act's primary objects. Exactly the opposite conclusion must be drawn on the record, in view of the Administrator's uncontested findings concerning the effects of homework in producing hidden child labor at substandard wages, thus circumventing the Act in two of its

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this version of the parenthesis, which was retained through many revisions of the bill after it was recommitteed. Eventually the clause was expanded in the House Committee to read, "(including the restriction or prohibition of industrial home work or such other acts or practices and such requirements as the keeping of records, labeling, periodic reporting and posting of orders and schedules)." House Confidential Subcommittee Print "A" of February 18, 1938. The clause disappeared entirely from the House bill when, shortly before passage, that body changed the entire scheme by substituting "statutory" for "committee" wages. Cf. H. Rep. No. 2182, 75th Cong., 3d Sess.; cf. also text *infra* at notes 32, 33.

<sup>27</sup> Cf. Section 12 and Section 3(1). The latter defines "oppressive child labor." The former prohibits producers, manufacturers and dealers to "ship or deliver for shipment in commerce any goods produced in an establishment situated in the United States in or about which within thirty days prior to the removal of such goods therefrom any oppressive child labor has been employed. . . ." See also note 17 *supra*.

primary object.<sup>28</sup> These findings therefore give added reason to sustain his conclusion that homework was not put beyond his power to prescribe the means necessary to achieve the purposes of the order and of the Act.

The second objection fares no better. It is mere negative inference drawn from the bare fact that the illustrative parenthetical clause was omitted from the final conference draft which became the Act. Nothing in the committee or conference reports or in the debates indicates a purpose to put homework, or the other practices enumerated at one time or another within the parentheses, beyond the purview of the Act or of the Administrator's power wherever these practices are shown to prevent achievement of the statute's ends.

The answer to the argument microscopically made from the long course of legislative events is obvious. From the beginning the parenthetical clause was but illustrative of the general authority conferred by the provision of which it was a part.<sup>29</sup> It "grew up through step by step additions, among which 'homework' was one," 144 F. 2d 624, until the parenthetical illustrations threatened to swallow up the general authority. If nothing more had occurred than elimination of the illustrations from a bill otherwise accepted, the change well might be put down, as Judge Hand suggests, 144 F. 2d 624, "to the belief that it was unwise to specify so much, lest the specification be taken as exhaustive."

However, as he points out, the course of events was quite different, and even more conclusive against the petitioners' view. The section containing the parenthesis began, and continued, as a feature of the Senate bill. This followed an entirely different plan from the one eventually adopted, which was a compromise of Senate and House proposals. The Senate bill placed administration of the Act in the hands of a board, which was by order to fix all minimum wages. In this form, including the parenthetical reference to homework,<sup>30</sup> the Senate adopted the bill. The House Committee to which the measure was referred likewise

<sup>28</sup> The Administrator, referring to the prohibition of Section 12, cf. note 27 *supra*, noted that the employment of children in either factories or homes, in the production of goods for commerce, must be hidden and commented: "This in itself contributes to the deterioration of minimum wage standards."

<sup>29</sup> Cf. note 26 *supra*; *Phelps Dodge Corp. v. National Labor Relations Board*, 313 U. S. 177, 188ff., 211; *Federal Land Bank v. Bismarck Co.*, 314 U. S. 95, 100.

<sup>30</sup> Cf. note 26 *supra*.

approved it. But the House itself declined to do so. It adopted a different scheme, substituting statutory wages for wages fixed by order as the Senate bill proposed.<sup>31</sup> There was therefore no need for, and the House bill did not contain, the parenthesis or the general provision of which it formed a part.

When the two bills came to conference, compromise was worked out by writing around the conference table the final measure combining features of both bills.<sup>32</sup> The House provisions for an administrator and for statutory wages were retained. But the latter were modified by providing for "committee" wages, to be fixed by order of the Administrator, by including the provisions of Section 8, including 8(f), and also of Section 6(a)(3) and (4).

Section 8(f), which originated in the Senate, thus found its way back into the final form of the measure, though without the parenthesis. The Conference report (H. Rep. No. 2738, 75th Cong., 3d Sess.) contains no reference to the elision and none appears in the record of the ensuing debate. 83 Cong. Rec. 9158, 9246. The history, accordingly, does not sustain the negative inference petitioners would draw from the omission. The parenthesis was inserted, in the Senate, without discussion or controversy. It was likewise eliminated without discussion or controversy. So far as appears, it was never separately considered. Not the clause alone or particularly, but the entire bill containing it was rejected by the House.

That rejection is no evidence that this single feature had special significance. Rejection of an entire bill cannot be taken to be a specific rejection of each and every feature, more especially of those later reintroduced in the final draft.<sup>33</sup> The most tenable conclusion is drawn by Judge Hand, that "the section, which apparently died with the Senate plan, was lifted out of that setting,

<sup>31</sup> The House bill also substituted an administrator for the Senate's board. Petitioners argue from the fact that substitution of "statutory" for "committee" wages was made because the House objected to the discretionary powers given the board in the Senate bill, H. Rep. No. 2182, 75th Cong., 3d Sess., and because it later rejected substitute bills patterned after the Senate measure, cf. 83 Cong. Rec. 7389, 7378, 7373, that Congress, in effect, rejected every feature of the bills which the House refused to enact. The non sequitur is apparent. But it may be noted the contention ignores entirely the Senate's part in legislation, as well as the compromise effected in conference between the two bodies and the fact that this reintroduced some of the discretionary features contained in the bills the House rejected.

<sup>32</sup> Cf. 83 Cong. Rec. 9256; H. Rep. No. 2738, 75th Cong., 3d Sess. (Conference Report).

<sup>33</sup> Cf. note 31 *supra*.

and was put into the compromise bill as it had stood originally." As he says, "It would indeed be a far cry to infer from that that all the items which by accretion had made their way into the parentheses were in this way excised from the Administrator's powers. Indeed, if so—as he argues—he could not even regulate labels. . . ." 144 F. 2d at 624.

The amendment to Section 6, relating to homework in Puerto Rico and the Virgin Islands, adopted in 1940,<sup>34</sup> and Congress' failure in 1939 and 1940 to adopt an amendment proposed by the Administrator to authorize explicitly prohibition of homework<sup>35</sup> cannot operate retroactively, as is urged, to give the statute enacted in 1938 a different meaning from what it then acquired.<sup>36</sup> And petitioners' contentions drawn from the Act's enforcement provisions misconceive their effect.

The idea seems to be twofold, first, that the Administrator has no enforcement functions under this Act; or, in any event, that the Act provides no means for enforcing the "terms and conditions," including restriction or prohibition of homework, which he may include in his order.<sup>37</sup>

The Administrator's function under Section 8(f), though primarily preventive, obviously is related to enforcement. And further, he is expressly granted powers bearing directly to that end. Apart from his investigative authority under Section 11, he has power also by express provision of that section to bring suits under Section 17 to restrain violations of wage orders.<sup>38</sup>

<sup>34</sup> Sections 6(a)(5), 6(c), 5(e), added by Act of June 26, 1940, 54 Stat. 615, 616. Section 6(a)(5) deals in detail with homeworkers in Puerto Rico and the Virgin Islands.

<sup>35</sup> Cf. H. R. 5435, 76th Cong., 1st Sess., § 4; H. Rep. No. 522, 76th Cong., 1st Sess., 8; 84 Cong. Rec. 3498; 86 Cong. Rec. 5122.

<sup>36</sup> It is not altogether clear, from the terms of the proposed amendment, cf. note 35 *supra*, whether its purpose and effect were to clarify preexisting provisions or to extend the Administrator's authority. The debate, 84 Cong. Rec. 6620-6622, indicates that opposition in the House was due primarily to belief that the amendment, if adopted, would "take away some of the exemptions that so-called farm people enjoy under the Act."

<sup>37</sup> It is said that Section 8(f) does not provide for a hearing with reference to the "terms and conditions" of a wage order and the failure of the Act to provide expressly for their enforcement, as it does for enforcement of orders issued under Sections 11(c), 12 and 14, indicates "the statute did not include the prohibition of homework as a 'term and condition' of a wage order." The argument, it may be noted, applies to all "terms and conditions." In effect it urges that all are unenforceable; and therefore none was intended.

<sup>38</sup> Section 11(a) provides: "The Administrator . . . may investigate . . . such facts, conditions, practices, or matters as he may deem necessary or

We need not determine whether this includes authority to sue independently to restrain violations of "terms and conditions" properly included in such an order or to ask for this relief as incidental to enjoining violations of the rate specified. Cf. *Hecht Co. v. Bowtes*, 321 U. S. 321, 330; *Ethyl Gasoline Corp. v. United States*, 309 U. S. 436, 461; *Morgan v. United States*, 307 U. S. 183, 194; *Warner & Co. v. Lilly & Co.*, 265 U. S. 526, 532. But certainly the absence of such authority cannot be assumed, closely related as it would be to enforcement of the order's primary term. Congress did not include authority to prescribe "terms and conditions" merely as a preachment. Cf. *California Drive-In Restaurant Ass'n v. Clark*, 22 Cal. 2d 287. We do not therefore consider further these assumptions.

Finally, petitioners insist that power to prohibit homework ~~could not~~ have been intended because the authority to prescribe "terms and conditions" applies only to "committee," not to "statutory" wages and will expire, by the terms of Section 8(e),<sup>39</sup> on October 23, 1945, seven years from the effective date of Section 8. This argument involves a medley of assumptions and conclusions, some contrary to the fact, others of doubtful validity. Among them are the ideas: (1) that the power to prescribe "terms and conditions" applies only to "committee" wages; (2) that the power to prescribe or maintain such wages expires altogether at the end of the seven years; and (3), upon these hypotheses, that it would be "absurd to assume that Congress intended that the Administrator could make so disruptive but temporary a regulation as the prohibition of homework would entail."

The last conclusion might be accepted, if its foundations were solid. But they crumble. In the first place the authority con-

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appropriate to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act. . . . Except as provided in section 12, the Administrator shall bring all actions under section 17 to restrain violations of this Act." (Cf., e.g., *Walling v. Helmerich & Payne*, 323 U. S. — (No. 27, decided Nov. 6, 1944); *Walling v. Belo Corp.*, 316 U. S. 624.

<sup>39</sup> "No order issued under this section with respect to any industry prior to the expiration of seven years from the effective date of section 6 shall remain in effect after such expiration, and no order shall be issued under this section with respect to any industry on or after such expiration, unless the industry committee by a preponderance of the evidence before it recommends, and the Administrator by a preponderance of the evidence adduced at the hearing finds, that the continued effectiveness or the issuance of the order, as the case may be, is necessary in order to prevent substantial curtailment of employment in the industry."

ferred by Section 8(f) is to be read, not as if it were given as of the date of the order (August, 1943) or the time when it may become effective,<sup>40</sup> but as of 1938, when the section took effect. Accordingly, at the minimum, the authority given was to apply over a period of seven years. And these were the most crucial, because the initial, years in the statute's anticipated life. The scope of the power was not cut down because the Administrator chose to try first the less effective, but similarly conferred though less extensive power of regulation.

Beyond this, it is not true that the power either to prescribe "committee" wages or to include "terms and conditions" in the order expires altogether at the end of the first seven years. Section 8(e) expressly provides for continuance or issuance of wage orders after that time, whenever the industry committee recommends and the Administrator finds "by a preponderance of the evidence . . . that the continued effectiveness or the issuance of the order, as the case may be, is necessary in order to prevent substantial curtailment of employment in the industry." And Section 6(a)(3), perhaps also 6(a)(4), expressly contemplates continuance of wage orders issued under Section 8 after the initial seven years. The exact scope of these provisions need not now be determined. It is enough, for present purposes, that they leave some room, and it may be considerable, for the issuance or continued effectiveness of wage orders after October 23, 1945.

Finally, it is not necessary in this case to decide whether the power to prescribe "terms and conditions" applies only to "committee" wages and not to "statutory" wages. Strong reasons have been suggested for believing it applies to both.<sup>41</sup> But this case involves only "committee" wages. The power to make them effective and to prevent evasion would not be cut down, were it more clear than it is that there is no authority to prescribe "terms and conditions" for "statutory" wages or were it true that authority to require "committee" wages would expire altogether with the initial seven year period. The question whether the authority to prescribe "terms and conditions" applies to "statutory" wages may be left for decision when it arises. Uncertain

<sup>40</sup> Cf. note 6 *supra*.

<sup>41</sup> Cf. the opinion of L. Hand, C. J., 144 F. 2d 608, 623, and the reservation in that of Frank, C. J., at 614, with the authorities he cites in note 7.

as the answer now is, it cannot give solid ground for inference that the power to prohibit homework was not a necessary means of making effective the minimum wage prescribed by the order.

Petitioners' arguments have been directed chiefly to the power to prohibit. If valid, they would apply equally to the authority to restrict or regulate. They would nullify the Administrator's power to establish or maintain minimum wages in the embroideries industry. They can have no such potency.

The judgments are.

*Affirmed.*

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Mr. Justice FRANKFURTER, concurring.

The Fair Labor Standards Act gives the Administrator charged with its enforcement power to fix wages so that they attain a basic minimum rate. In view of the vast and varied range of situations thus placed under his wage-fixing authority, the Administrator naturally enough was given by Congress the power to issue these wage orders on "such terms and conditions as the Administrator finds necessary to carry out the purposes of such orders, to prevent the circumvention or evasion thereof, and to safeguard the minimum wage rates established therein." Section 8(f), 52 Stat. 1060, 1065, 29 U. S. C. § 208(f). It would disregard the authority thus given by Congress to deny that the power to fix minimum wages carries with it the subsidiary power to forbid and to prevent evasion of wages so fixed. In the light of the showing made on this record concerning the embroideries industry for which the Administrator concededly fixed valid wage rates, the measures that the Administrator took through provisions dealing with homework in the embroideries industry were relevant to, and in enforcement of, the subsidiary power granted by Congress to prevent evasion of the rates fixed for that industry.

And so I join in the Court's opinion.

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Mr. Justice ROBERTS.

With deference I venture to think that the Court here essays to read into the law what its words, fairly construed, do not import. The Court arrives at that result by forming a judgment as to what Congress probably should have said, and would have

said, if it had considered the matter, in order to make the statute what the Court deems a more perfect instrument for attaining the general objective which Congress sought to attain, and then makes the necessary additions to the language Congress has used. The principal, if not the only argument I find in the opinion for reading something into the statute, is that otherwise it cannot be most effectively applied to certain industries unless the industries themselves are made over.

Section 8(f) provides that the Administrator's orders issued under the section "shall define the industries . . . to which they are to apply." It is not suggested that the order in question is of this description. That with which the industry committee's investigation dealt was a single industry in which two methods of work were pursued. Obviously it is not a definition of the industry to exclude from it some of those who labor in it.

The section also provides that the Administrator's orders "shall contain such terms and conditions as the Administrator finds necessary to carry out the purposes of such orders, to prevent the circumvention or evasion thereof, and to safeguard the minimum wage rates established therein." The philosophy of the court's opinion can be nothing less than that the Administrator may, if he finds it necessary, rewrite the statute. Suppose he finds that, in a given industry, it is, as he puts it, impossible to enforce the minimum wage provision. May he thereupon issue an order prohibiting the further prosecution of that industry and requiring all those who pursue it to follow some other calling? It may be said that the supposition is, on its face, ridiculous. But is it any more so than what was here accomplished? Forty per cent of the workers in an industry, under pain of otherwise losing their occupation, are compelled to give up what they have done time out of mind, and if they desire to pursue their calling to do so under completely changed economic conditions, not in their homes but in factories which, if they are available at all, may be remote from their homes.

The language of § 8(f) has a reasonable and proper office in the context of the Act. The provisions permitted by that section to be inserted in an order are obviously such as are incidental to administration, such as pertain to keeping records or filing reports; not exorbitant or excessive so as to amount to a regulation or suppression of an existing and recognized industry.

In my view, one need not go outside the provisions of the Act to be convinced that Congress never intended to grant the Administrator the power he has assumed. If it be thought, however, that the phraseology of § 8(f) is of doubtful import, the legislative history seems to me to demonstrate that Congress purposely, and not by inadvertence, denied the asserted power to the Administrator.

The statute aimed at three things,—the limitation of the hours of work, the fixing of minimum compensation per hour, and the prohibition of child labor. We may eliminate from consideration the first and third of these objects, and the statutory provisions implementing them, since we are concerned only with minimum wages. The Act creates a Wage and Hour Division in the Department of Labor and authorizes the appointment of an administrator to be in charge of it (Section 4). It requires the appointment of industry committees representing those engaged in any industry (Section 5). It requires every employer to pay every employe engaged in commerce, or in the production of goods for commerce, at the rate of not less than twenty-five cents an hour for the first year, not less than thirty cents an hour during the next six years, and not less than forty cents an hour after the expiration of seven years. The Administrator is given no authority to issue any orders concerning these prescribed rates or their application in industry, with the sole exception about to be mentioned.

Provision is made to raise wages above the prescribed minima during the seven year period after the effective date of the Act, without curtailing employment or disrupting the economy of an industry. Section 6 refers the reader to § 8 creating machinery to accomplish this. The latter section provides for the convening of industry committees to which the Administrator shall refer the question what minimum wage rate shall be set for the industry. The committee is to investigate conditions in the industry, hold hearings, and recommend the highest minimum wage rates which it determines, having regard to economic and competitive conditions, will not substantially curtail employment.

Upon receiving the committee's recommendation, the Administrator, after an opportunity for hearing, may approve or disapprove the committee's recommendation. If he approves, he shall do so by an order the effect of which is to put into force the

recommended wage scale. Such orders are not to continue in force after seven years from the effective date of the statute unless the committee and the Administrator conclude, and so declare, that it is within the purposes of the Act that the wage fixed by the order shall remain in effect after expiration of that period notwithstanding the requirement of § 6 that all wages shall reach the minimum of forty cents an hour at that time.

Now it is only in enforcement of a committee's report that the Administrator has power to issue an order with respect to wages, and it is in this context that § 8(f) permits him to include in his order "such terms and conditions" as he "finds necessary to carry out the purposes" of the order, to prevent circumvention or evasion, and to safeguard the wage rates thereby established.

With respect to the minima fixed by § 6, which apply universally (except where the special procedure authorized by § 8 is invoked), the Administrator has no authority to issue orders such as that issued in this case. He cannot, because he finds it difficult to enforce the Act in an industry, either remake or suppress the industry. The result of the decision is that, in the exceptional case where a special rate of wages is set in advance of the prescribed rate, the Administrator may do what, in the generality of cases, he may not do. This circumstance gave one of the judges below so much trouble that he was willing to hold, in the teeth of § 6, that the Administrator might in all cases make such orders as that here in question. Thus, instead of writing in additional provisions in § 8(f), as does this court, he was prepared to write in a new provision in § 6 to make the Act a complete and logical statute.

We have, then, this situation: With respect to any industry which has not been taken out of the provisions of § 6 by an industry committee's report and an Administrator's order, the Administrator cannot forbid home work. As respects an industry in which wages have been fixed by a committee, the Administrator has these sweeping and destructive powers. And this, in spite of the fact that the committee is authorized and required to deal with the wages of the industry as a whole, and did so deal with them here. The committee never considered the question of an appropriate wage for the industry, under the conditions which would prevail, after the suppression of a substantial part of it by the Administrator's order. The interpretation now sanctioned

of the Administrator's statutory authority to make orders "to prevent the circumvention or evasion" of the purposes of the Act, as including the power to make over the industry to which a wage order is to apply, thus defeats one of the most fundamental purposes of the Act. By § 8 no wage order is to be promulgated with respect to an industry unless the question of the minimum wage for the industry has been referred by the Administrator to the industry committee, and the conditions in the industry and the appropriate wage for it have been the subjects of investigation and report by the committee. The committee is specifically enjoined to recommend to the Administrator "the highest minimum wage rates for the industry which it determines, having due regard to the economic and competitive conditions, will not substantially curtail employment in the industry". And by § 8(d) the Administrator, before he promulgates a wage order, is required to find, after "taking into consideration the same factors as are required to be considered by the industry committee", that its recommendations will carry out the purpose of § 8. These requirements make it clear that the terms and conditions which § 8 permit the Administrator to attach to his wage orders do not include those which materially alter the conditions of the industry which must be considered and reported upon by the committee. Such requirements are futile if the Administrator, under guise of preventing evasion of a minimum wage order, which the committee has recommended, has power, on promulgating a wage order, to change the industry into one which the committee has never investigated. The Administrator's action is in effect a subversion of the committee's report, whereas the Act contemplates a resubmission to the committee in such a case. *Opp Cotton Mills v. Administrator*, 312 U. S. 126, 146-149.

Surely, if any such sweeping construction is to be given words having a narrower import, inquiry into the legislative history is of capital importance. That history, instead of being "wholly ambiguous" and furnishing a "dubious basis" for conflicting inferences, seems to me to be letter-clear.

The Presidential message urging enactment of this legislation states two objects: "To reduce the lag in the purchasing power of industrial workers" and to put an end to "the existence of child labor." Both purposes were to be accomplished "without creating economic dislocation."<sup>1</sup> Pursuant to this recommendation, Sen-

<sup>1</sup> H. R. Report No. 1452, 75th Cong., 1st Sess., pp. 6-7.

ate Bill No. 2475 was introduced and a similar bill, H. R. 7200, was introduced in the House. Joint hearings were held by Senate and House committees. Senate Bill No. 2475 was reported to the Senate. Those in charge of it on the floor repeatedly stated that the purpose was to limit the bill strictly to minimum wages, maximum hours, and child labor. There is no question that many experts in the field felt that the prohibition of home work was essential to the accomplishment of the objective of the legislation. In the joint hearings, the Secretary of Labor testified that power should be given to the administrative authority to "prohibit entirely the use of industrial home work."<sup>2</sup> In this connection the Secretary also advised that the administrative powers to be granted should be carefully defined by the Congress so that the Act would clearly state them.<sup>3</sup> The question of home work was again broached at the hearings at various points. Notwithstanding this, the bill, as reported to the Senate, contained no provision for the prohibition of home work. The measure was debated at length in that body. As it then stood, § 9(6), dealing with administrative orders, which became § 8(f) in the bill as enacted, provided that an order might contain terms and conditions the administrative authority should find necessary to carry out the purposes of the order to prevent circumvention or evasion, or to "safeguard the fair labor standards therein established." It will be seen that this language is not materially different in meaning from that finally embodied in § 8(f). An amendment was proposed from the floor to add the words "including the restriction or prohibition of industrial home work" and was agreed to.

In order to expedite the adoption of the legislation, the House Committee limited its consideration to the bill passed by the Senate and reported it favorably with amendments. Without detailing the House proceedings, it is enough to say that ultimately a bill was presented largely embodying the provisions of Senate Bill No. 2475 but creating an administrator in lieu of a board. Section 9(6), which related to wage orders, contained the same provisions respecting prohibition of home work as the Senate bill.<sup>4</sup>

The objections to the Senate bill in the House were such that a new measure was reported establishing fixed minimum wages and maximum hours and granting the Secretary of Labor only

<sup>2</sup> Testimony at Joint Hearings, pp. 184, 190, 196, 197.

<sup>3</sup> *Ibid.*, p. 195.

<sup>4</sup> 82 Cong. Rec. 1511-1516, 1572-1577, 1580, 1585.

the power to declare that a particular industry was "an industry affecting commerce" and so subject to the Act. It contained no provision for administrative orders. During debate on this proposed bill a substitute was presented containing a section relating to wage orders, with provisions respecting home work the same as were contained in the Senate bill as passed and in the substitute theretofore offered to the House. The bill thus offered was rejected and the newly reported House bill was passed. Conferees were appointed amongst whom were the Senator who had first proposed the amendment respecting orders prohibiting home work and two of the Representatives who had presented bills containing similar provisions. The Conference Committee deliberated for a matter of twelve days and evidently gave the most meticulous care to each section of each of the bills before it. It in effect rewrote the measure. The Conference Report shows that the committee adopted the theory of the House bill fixing definite minimum standard wages to step up periodically in the future and also, as respects industry committees and interim orders based on industry committees' reports, adopted the more flexible system embodied in the Senate bill.

It is clear that in redrafting § 8(f), which was § 9(6) of the Senate bill, the conferees consciously and deliberately rejected the clause "including the restriction or prohibition of industrial home work or of such other acts or practices." The Conference Report was accepted, the bill passed both houses, and was signed by the President.

The Wage and Hour Division of the Department of Labor recognized that it had no power to abolish home work. In its First Annual Report, that Division stated (p. 14) that it was treating home workers as employes and not as independent contractors. In the same report (p. 31) the Division went into detail with respect to regulations for record-keeping in respect of home work. At page 46, the Division said: "A difficult problem which has required the use of special inspectors and special techniques is that of industrial homework. It has been necessary to make elaborate and time-consuming investigations at the establishment of the employer and in the homes of the workers." That Division cooperated in the drafting of a bill (H. R. 5435)<sup>5</sup> introduced by Representative Norton of the Labor Committee, which provided,

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<sup>5</sup> First Annual Report, 1939, p. 160.

*inter alia*: "The Administrator shall have power to make, issue, amend, and rescind such regulations and orders as are necessary or appropriate to carry out any of the provisions of this Act. Without limiting the generality of the foregoing, such regulations and orders may . . . make special provision with respect to, including the restriction of, home work subject to this Act to the extent necessary to safeguard the minimum standards provided in this Act or in any regulation or order issued pursuant thereto," . . . The proposed amendment was debated at length and was defeated. With respect to it Representative Norton said:<sup>6</sup>

"I am sure that business would be less jittery about this law if the Administrator had the right to define the application of the law. Without this amendment he may not do so and some business has suffered as a result. I believe that he further needs the power to define technical and trade terms used in the act and the power to make special provisions with respect to industrial home work and make special provision for constant-wage plans consistent with section 7 relating to hours of work. Home work has long been a blot on the economic picture of this country, and I regret to say that in some cases employers have resorted to this means of employment to escape the provisions of this law."

Again she stated to the House:<sup>7</sup>

" . . . we are proposing in section 4 of H. R. 5435 to authorize the Administrator to make rules and regulations to carry out any of the provisions of the act. This section will also give him the right to define terms used in the act and make special provisions with respect to industrial home work.

As the act is now written it is extremely doubtful whether the wage and hour standards which it establishes can be enforced as to industrial home workers. Under present practice in industrial home work industries, the Administrator is unable to secure proper records on wages and hours of home workers. Business concerns relying on home work for their labor do not ordinarily deal directly with the home workers but turn over the goods or articles on which the work is to be done to contractors who employ the home workers. If time permitted, I could give you concrete examples of cruelty in this field. Section 4 of the amendments would give the Administrator the necessary authority to cope with this situation."

In the Annual Report of the Wage and Hour Division for 1940 industrial home work was discussed at page 89 and statements made as to the requirements of record keeping in respect of it.

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<sup>6</sup> 84 Cong. Rec. 3498.

<sup>7</sup> 86 Cong. Rec. 5122.

After the Wage and Hour Act had become law it developed that if the prescribed minimum hourly wages were enforced in Puerto Rico certain industries there, which consisted almost entirely of home work, would be destroyed. It was believed that the only relief which would correct the situation would be to amend the statute to abrogate the fixed minima named in § 6 to provide for an industry committee to fix lower standard wages for industries consisting largely of home workers in the island. Such minima would be recommended by an industry committee and implemented by orders of the Administrator.<sup>8</sup> The amendment was adopted in 1940. Far from indicating any thought on the part of Congress or the Division that the Administrator was empowered to ban home work, this legislation, taken in connection with the defeat of H. R. 5435, indicates quite clearly that no one concerned either in the passage or the administration of the law had any notion that the Administrator was authorized to deal with the economic problem involved in home work.

A section of the Wage and Hour Division's Report for 1940 contained a discussion of enforcement of the Act with respect to home work, without any suggestion that the Administrator could deal with it by abolishing it. (p. 89)

In the Report for 1941 the Division, for the first time, suggested that the Administrator had been considering, in connection with wage orders, the question: "Must homework be abolished as one of the terms and conditions of a wage order in order to safeguard and effectuate enforcement of the order". (p. 64)

Thus it appears that the Administrator, having failed to obtain explicit authority from Congress, began contemplating the effort to persuade the courts that he had implied authority in the premises.

In the Report for 1942 (p. 19) all that appears is the following:

"The problem of industrial homework has been one of the most important administrative questions since the inception of the Fair Labor Standards Act. For the guidance of the Administrator, the data were presented for the jewelry and knitted outerwear industries, showing conditions of industrial homework, the average earnings of homeworkers, the difficulties of enforcement of mini-

<sup>8</sup> See Annual Report, Wage and Hour Division, 1940, p. 113; Hearings Senate Committee on Appropriations, Emergency Relief Appropriation Act, 1941, p. 3; S. R. 1754, 76th Cong., 3d Sess., p. 5 ff; H. R. No. 2186, 76th Cong., 3d Sess., p. 15.

minimum wage provisions for homeworkers, and the methods of evasion of minimum wage regulations by workers and employers."

Though there was no declaration of a purpose to enter the sort of order now in question, it was, in fact, entered August 21, 1943.

In the Report for 1943, for the first time, Congress was apprised of action being taken (p. 19) thus:

"Enforcement measures established to protect the standards of the Act for factory employees have not been effective in controlling hours and wages of homeworkers. This failure prompted regulation of industrial homework under wage orders in industries in which homework is prevalent. These regulations are designed to protect factory employees against unfair wage competition.

Industrial homework in these industries is restricted to persons who are unable to adjust to factory work because of age or physical or mental disability or who are home-bound because of an invalid in the home and who have been engaged in the particular industry prior to a specified date. This latter requirement may be waived in unusual hardship cases. These restrictions were adopted after searching examination of the subject which included the opinions and convictions of representatives of management and labor. A total of 4,451 applications for industrial homework certificates have been received and 3,701 certificates have been granted."

But, by that time, this case had been taken to the Circuit Court of Appeals to test the validity of the order here under review.

It would reverse the judgment.

The CHIEF JUSTICE joins in this opinion.